



NOTES AND COMMENTARIES
ON
CHINESE CRIMINAL LAW
AND
COGNATE TOPICS

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NOTES AND COMMENTARIES

ON

AND COGNATE TOPICS.

WITH SPECIAL RELATION TO RULING CASES.

TOGETHER WITH A BRIEF EXCURSUS ON

CHIEFLY FOUNDED ON THE WRITINGS OF THE LATE

Sometime H. B. M. Consul-General in China.

 BY 

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PREFACE

To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever — incredible but, to my knowledge, a fact. Nor would it be easy to enlighten them — with their limited knowledge of the language.

Practically, however, no epitome of Chinese Law has appeared since the days of Sir GEORGE STAUNTON — nearly a century ago; and his laborious work at its very publication was quite out of date. Some portions of the law have indeed from time to time appeared — hidden away in the magazines chiefly; but no complete detailed view has been presented — however blurred.

The present brief compilation is largely based upon the researches of a very distinguished student, who in addition to a profound knowledge of the Chinese language and people possessed a singularly judicial intellect. Added to his knowledge and his mental endowments, Sir CHALONER ALABASTER had also a lengthened experience of the East — extending from the middle fifties until the early nineties. During his lifetime, Sir CHALONER, among his other literary enjoyments, made very many miscellaneous notes upon the Chinese legal system and its working, principally relating to the criminal portion of the law, and the result not only of study but of observation. The writer of the notes intended to amplify and arrange them, with a view to the publication of a really important and comprehensive work, and had indeed conversed with me upon the subject at various times. This work would probably have followed the arrangement of the latest edition of the Code, clause by clause; and the operation of the law would have been illustrated by selected cases relating to and placed under the appropriate

clauses. The work would then have been periodically brought up to date as occasion required, and would have served the purpose of a book of reference both for the scholar and the merchant. The inevitable, however, prevented the fulfilment of this project — which doubtless will soon be performed by others. Believing at the moment that some effort was better than none, I ventured to take the matter in hand on my own responsibility. This very brief and informal compendium is the result.

Inasmuch as I anticipate a considerable measure of adverse criticism, it seems well at this stage to locate the responsibility, and indicate where, and upon whom, punishment may justly be inflicted. Let me state, therefore, that I have rewritten, reset, and reasoned the whole; that the arrangement is mine; and that I have added very much additional matter. It may also be that in places I have not rightly apprehended Sir CHALONER's meaning — though to ensure accuracy the original Chinese authorities have been consulted by me.

One way and another therefore, errors have probably crept in, and where they have, the blame may rightly be ascribed to me.

As regards the title. I have entitled the book merely "Notes and Commentaries", because, upon the whole, a curb has been placed on portentous gravity — the memoranda I have mentioned were many of them written with that element of humour which a distinguished scholar found not incompatible with the gravest studies. A thing may be humorous and yet may be good law, and accordingly I have endeavoured to preserve, or even in a measure to add to, the characteristics of the notes. It is a not uncommon custom for foreigners in China to take their picnics in temples: — 'What is this?': 'who is that?' and so forth. By this unconscious mode they acquire knowledge.

Further the volume is styled a Criminal Law book; but the term 'Criminal Law' has in China a more comprehensive import than is the case with us. The Code for instance has a distinct division marked off as "Criminal Law", consisting of the discussion of such

offences as homicide, larceny, etc. This division is of itself sufficiently comprehensive and bulky: but the Criminal Law is not only to be found herein, but is also stored away in all corners of the Code, in the Supplementary Laws, and in authoritative treatises.

Indeed to style the aforesaid division in the Code 'Criminal Law' is confusing — and I have only done so in deference to custom. What the title really implies is that portion of the general law set apart for the special supervision of the 'Hsing Pu' (Board of Punishments, or Judiciary Board) in Peking — and naturally with a Board whose special functions are legal discipline, the bulk of the Criminal Law was allotted to it. It is accordingly only by a tour de force that 'hsing' (which means simply 'punishment') can be rendered 'criminal'.

And here I feel inclined to mention the point that Chinese Law, though in a sense systematic, can hardly be said to be concentrated. I mean that for example in the Code, all the considerations touching, e. g., any given offence,

do not appear under that offence — the whole subject is not thrashed out under one head — but on the contrary appear in multitudinous connections. One of the objects of this work is to attempt concentration.

In regard of the general arrangement of the book, it may be well to state that I have merely followed what seemed to me to be a logical English system. There is no reason why Chinese law may not be taken in a form unlikely to impair the digestion of a western reader. The Introduction gives a rough outline knowledge of the system as a whole — a few of the more characteristic features being sketched with some particularity. In Part I of the volume considerations specially touching practice and procedure and the general administration of justice are dealt with. Chapter I more particularly exhibits and explains details of practice and procedure; Chapter II, as its name implies, describes the various modes of punishment and details in connection therewith; by a natural sequence Chapter III describes that important feature

of the system — the commutation and mitigation of penalties; and Chapter IV describes the legal rights and duties and the general legal position of certain classes of individuals employed in the administration of justice.

Part II consists of an exposition of that important factor in most Chinese cases — relationship. The considerations in this part are exceedingly important, and an accurate knowledge of them is essential to elucidate many points in the part following. By making the part in a measure discursive — e. g., marriage — I believe its general utility has been increased.

In the third part of the volume, specific offences are dealt with in a natural and simple manner. By reason of their mass, and also on account of the manner in which they illustrate other parts of the law, I have given the prior place to Offences against the Person. Homicide in especial has been treated very fully — but quite in proportion with its importance in the general law. That portion devoted to assault, etc., though not lengthy, is somewhat detailed. As regards rape and kindred offences, the

Chinese believe in stating plain facts in plain words — I have treasured this belief. Offences against Property are fairly fully treated — some portions (e. g., larceny and arson) at considerable length. In due order follow offences against the Peace, the State, Justice, Religion, Commerce, and Morality and Health. In every case the specific treatment of a particular group of offences being preceded by an explanatory general consideration — often very brief, and which, again, I have ventured to make somewhat discursive.

In the Excursus will be found a slight view of the Law of Property, and some interesting decisions upon the Law of Inheritance, Trusts, etc. The decisions are practically word for word translations, and are particularly interesting as being typical examples of reasoned judgments. The Appendices consist of an essay upon the evolution of the Law of Marriage, a curious analogy (or comparison, if it be preferred) between Chinese and Roman Law, and a list of Chinese works which it is thought may be useful to those who propose assailing this subject.

As regards the rendering of the names of the various Chinese offences into the corresponding English terms — this has not always been an easy task. From the nature of things, Chinese Law is a Law of Definition, and where in English one term would be sufficient, in Chinese a score may be necessary to express the exact significance. Good examples of places where this difficulty arises occur in the case of homicide, but even in respect of so comparatively compact an offence as perjury one term is insufficient, and two, from which others diverge, are considered necessary.

As regards romanisation, this has invariably been adopted with the names of cases; elsewhere in general the Chinese characters alone appear—but, for the information of those unacquainted with the Chinese language, I would explain that the translation or purport of the characters in every case immediately precedes them.

In regard of the Chinese authorities upon which this work is based, two collections of cases upon the Criminal Law have chiefly been referred to — the title of the one collection

being 'Hsing An Hui Lan', and of the other 'Po An Hsü Pien'. The former work is indicated throughout this volume by the initials H. A. H. L., and the latter by the initials P. A. S. P. The 'Hsing An Hui Lan' has especially been drawn upon, and exhibits and explains in a very pleasing manner the working of the rules laid down in the Code and the Supplementary Laws. Its characteristics are lucidity and directness of expression. The number of references made to one or other of these collections is very great, and I have endeavoured that these references shall be as correct as possible. Over and above the two collections mentioned, a very careful perusal has been made both of the original Code and of the Supplementary Laws. The Official (Peking) Gazette has also been referred to — throwing as it does many side-lights upon the working of the system.

I have also had occasion to refer to a few foreign publications — such, for instance, as the well-known works of the late Mr T. T. MEADOWS. But western aid has not been greatly

forthcoming in this branch of sinology. Some very recent and noteworthy work, however, has appeared — for instance, the critical and important articles in the pages of the “China Review” from the pen of Mr GEORGE JAMIESON C. M. G., lately H. B. M. Consul-General in China, and a recent publication in the excellent ‘Variétés Sinologiques’ series of Sicauei entitled “Le mariage Chinois”.

In concluding, I venture to make note here of the obligations I am under to that great scholar, Dr GILES, Professor of Chinese at Cambridge University.

My young cousin, Mr C. G. ALABASTER, has been of very valuable assistance to me, especially in the onerous matter of careful proof revision.

To Mr F. DE STOPPELAAR of Leiden I am indebted for painstaking and finished conduct of the printing.

ERNEST ALABASTER.

CAMBRIDGE,

June, 1899.

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INTRODUCTION

§ 1. The first indication of Law to be found *First indication of Law.* in Chinese tradition is the institution of marriage attributed to Fu Hsi B. C. 2852. Previous to that time temporary unions appear to have been the rule, and neither did the father know his sons, nor the sons their father. From this date, however, some order appears to have been introduced, and the nation as it then existed being divided into various clans, the law prescribed that unions should not take place between members of the same clan.

And so, stage by stage, from the remote *Progression.* period of Yao, Shun, and Yü, through the progressive periods of the Han, T'ang, Yüan (Mongol), and Ming dynasties, until the present Manchu rulers, as cases arose a remedy was applied and recorded, until the law has grown,

gradually crystallized, and now — after several previous attempts (*infra*) — been systematically arranged in the present Penal Code.

* * * * *

*Attempts at
codification.*

§ 2. A tendency to codify may be remarked throughout the whole course of Chinese legal history — a natural effect of the paternal despotism which has throughout all ages been the prevailing form of constitution. As early as Shun (*circa* B. C. 2317) attempts were made in the direction of the formation of some constant system, but the records relating to this are necessarily scanty and of merely historical interest. Fifteen hundred years later (for centuries in early Chinese history may be lightly omitted) a system was framed by one Li Kuei — a system sometimes called the first regular Code of penal laws. This work appears to have been divided into six portions; the first three parts relating to practice, the fourth to the general administration, and the last two consisting of an exposition of offences. Again the celebrated Shih Huang-ti (*circa* B. C. 221) framed a scheme without any regard to precedent, which only remained in force until the close of the short-

lived dynasty some fifteen years later. It was not, however, until the reign of Kao Tsu of the T'ang dynasty (*circa* B. C. 206) that a Code worthy of the name was drawn up; and this system, it would seem, was primarily and essentially intended as a mere guide for the convenience of judicial officers, and not for the public at large. It is very questionable whether *Yung Lo's Code*, a Code in the proper sense existed before Yung Lo of the Ming dynasty (*circa* A. D. 1403); but during the reign of that prince the well-known system was framed upon which the present Code has been grafted.

* * * * *

§ 3. The collection of laws known as the *Ta Ch'ing Lü Li* 大清律例, forms the Code of the present dynasty — the *Lü* being the original Code published when the dynasty was fully established in power and based largely upon the system of Yung Lo (*supra*), the *Li* the subsequent statutes enacted from time to time. Many of the *Lü* are those of the previous dynasty, adopted and re-enacted by the Tartar Princes: others (such, for instance, as those affecting the Tartar

population) date back merely to the commencement of the dynasty. Sir George Staunton has translated the *Lii*, but as he omits the *Li*, his work — valuable as it is — gives an insight merely into what the Laws of China were two centuries and a half ago, and not what they are at present.

The Code, it may be well to mention, is not, in its essence, a dynastic, but a national institution: moreover the head of the State in legislating afresh and making the *Li* may not follow the dictates of his own arbitrary will, but, on the contrary, must obey certain general principles well-known to the country at large.

The collection is accompanied by a running commentary, published by Authority, and notes of equal weight explaining the meaning of doubtful phrases. Every five years a fresh and revised edition is published by Authority — as few as possible variations being made.

In deciding cases, the Code furthermore provides that magistrates shall take cognizance of cases which have been referred to Peking for consideration and published by the Judiciary Board there — under the name of *ch'ên an* 陳案 — for the guidance

of the Provincial Authorities — which decisions are destined to be eventually embodied in the supplementary laws, but are given effect to before being actually so embodied.

The laws are divided into six divisions, corresponding to the six Boards at Peking, and they are further supplemented by the *Liu Pu Tsê Li* 六部則例 — *i.e.* the Rules established by these offices to regulate the practice in regard thereto.

The Code is very full in respect of that portion of the Criminal Law touching offences against the Person, but singularly meagre with regard to Commercial Law, which practically seems to be left to the regulation of the local guilds — the latter bodies determining between themselves all questions of contract, insolvency etc., according to the prevailing rule or custom of the trade they represent.

* * * * *

§ 4. The distinction between the *Lii* 律 and the *Li* 例 seems to need some further explanation. The *Lii*, then, are the fundamental Laws which never change: the *Li*, the special Statutes

*Distinction
between Lii
and Li.*

supplementary to the original Code, which modify the legal treatment originally specified, and which are themselves subject to constant additions and a decennial revision. No *Lü* are made, but where it is found necessary to provide for some unforeseen contingency a *Li* is established. Thus, at one period it was desired to stop the export of silver; and accordingly, in the first instance a *Li* was made, declaring the export of silver, *like* that of gold, iron, sulphur, etc., to be contraband; subsequently it was declared that, inasmuch as merchants evaded the law by melting down their rough sycee and recasting the metal into dollars, the *coinage of dollars* was an offence against the contraband regulations. The result was in short attained by means closely resembling a fiction, for it was impossible to forbid the *export*, the law declaring it lawful to pay for foreign goods either in sycee or in dollars.

* * * * *

Quotations thereon. § 5. The distinction between the *Lü* and the *Li* is further well shown in the following quotations — touching chiefly the Criminal Law.

‘The Law never changes, and the Statute
‘adapts the Law to the time and circumstances’
查律乃一成不易例則隨時變通
(H. A. H. L. Supp. vol. XIV. p. 63).

‘As where the Law was originally mild, and the
‘Statute renders it the more severe or *vice versa*’
**故有律本輕而例加重者亦有律本
重而例改輕者** (*id.*).

‘So, in cases of robbery where in resisting
‘arrest the thieves kill or wound anyone, by
‘the Law no distinction is made between principal
‘and accessory, and the sentence is in every
‘case decapitation subject to revision’ **即如
竊盜臨時拒捕及殺傷人按律均應
不分首從問擬斬候** (*id.*).

‘But the Statutes (herein) distinguish between the one
‘who kills and the one who wounds — the former the
‘principal, the latter an accessory — and furthermore
‘in cases of wounding, between injuries from cutting
‘instruments, and blows, hacks, etc., specifying
‘different penalties for each’ **而例內則將
殺人傷人爲首爲從及傷之或金刀
或手足他物之處分別等差科斷** (*id.*).

‘In fine, the Statutes as they stand differ materially
‘from the Law in their definitions of offences’
是現行定例原與律內罪名不同 (*id.*).
And ‘you cannot quote the Law in reference
‘to the Statute without confusion’ 自不得舍
例言律致滋軋轢 (*id.*).

* * * * *

*Practical ex-
emplification of
distinction.*

§ 6. Thus the Law defines a crime, and the
Statute distinguishes its gravity or comparative
unimportance in relation to the attendant
circumstances. For example the Law defines the
crime of assembling people for illegal purposes,
and prescribes the penalty : the Statute distinguishes
between an assemblage of ten persons, and one
of twenty, and prescribes the measure of punishment
in either case.

Where both the fundamental Law and the
special Statute apply, the Statute is always to
be taken as the guide. On the other hand,
where neither the Law nor a Statute fits the
case (precisely), the latter is to be brought
under some law applying to circumstances of
like nature ; ‘but in doing so, Fundamental Laws
‘are to be applied — and not, by forced construction,

‘some Statute of greater severity’ ○ ○ ○ 係
比引律條所載只可比引原律不得
援引律外加重之例。 In other words, in
these cases the Law will be preferred to the
Statute.

* * * * *

§ 7. The relationship between the *Lii* and the *Li* has some affinity to that existing between the old Common and Statute Law of England, but does not exactly correspond, in that the *Lii* of each dynasty is generally identical with that of the preceding one and is a written Code, and further that the Statutes though practically adding to or abrogating the *Lii*, are considered as secondary to and within it — as bye-laws are within the charter under which they are imposed.

Relation in a measure comparable with that existing between English Common and Statute Law.

* * * * *

§ 8. The distinction just noticed is the outcome of a desire to reconcile law and justice — a desire expressed in certain maxims about to be alluded to, and not capable of realization with

Reason for distinction.

the machinery supplied, by reason of a subtle conflicting force.

* * * * *

*Desire that law
and justice
coincide.*

§ 9. It is said that 'if the Law does not 'provide a remedy for injustice, one must be 'found.' It is not appropriate that two cases exactly similar should be decided differently because no clear ruling is laid down in a Statute

情罪相等未便因例無明文致滋

*Impossible to
satisfy.*

輕縱. This seems plain enough, but in practice, in direct infraction of great legal principles and maxims, it has been found an impossible standard to attain to.

*Application of
principle that
the person is
more important
than property,
an example.*

The principle is laid down that 'in all ages 'the person has been considered more important 'than mere property' 人重於物今古所同; but in practice, it appears that a robber who kills or wounds the owner of property is more severely dealt with than a person who kills or wounds the protector of an unvirtuous woman. In a discussion upon the point, with a view to rectify the anomaly, the Emperor himself directed a remedy to be found, on the ground that 'the 'Law lays down great principles and the Statutes

‘accommodate these principles to human nature’
律設大法例順人情 — contending that it was not just that whereas it was worse to steal a woman than to steal property, yet a robber who wounds his victim will be sentenced to death, while in the other case the offender will but receive two degrees more punishment than the ordinary penalty. The Judiciary Board was of opinion, however, that nothing could be done.

* * * * *

§ 10. Too great a desire to draw distinctions *Desire to draw distinctions a blot on Chinese system and fatal to combination of law and justice.* is one of the blots on the Chinese system of law. In fact emanating from the wish to effect the combination of law and justice, the practical result of this desire has been fatal thereto. Murder to an Englishman is murder whoever the victim may be; but Chinese jurists say it is not right that the punishment for raping and causing the death of an unchaste woman should be the same as that for raping and causing the death of a chaste one **則強姦殺死犯姦婦人亦不應與強姦殺死良婦同科**.

* * * * *

*The process
of revision
favoured: a
further ex-
ample of de-
sire to attain
perfection.*

§ 11. The desire to attain perfection is further most practically exhibited in the process of revision so favoured under this system — the process by which many a case is fully investigated by a lower Court, and the results of this research in a manner ‘checked’ by the higher powers. This process probably finds its most liberal expression in connection with the Criminal Law: its manifest defect is a certain loss of time and waste of energy.

* * * * *

*Conflict of
Chinese and
Tartar laws
a difficulty
and*

§ 12. A very practical difficulty that the Government has to contend with is the divergence between the Tartar and Chinese laws — a result of tactful concession on the part of the Manchu conquerors to their Chinese subjects. It is somewhat amusing to see the feeling exhibited by the Judiciary Board when a question arises on which the two Codes clash; for example, the case in which the knotty point had to be decided — are mules and donkeys cattle? The Board declined to say: they had nothing to go on: they knew nothing about Mongolia and its special laws and customs, and could venture no opinion:

‘let the *Li Fan Yüan* 理藩院 (the Mongolian ‘Superintendency) decide.’

Nor is the difficulty an imaginary one. If the Tartars claimed that Tartar Law should hold in Tartary, while Chinese Law was permitted in China, then things might, it is true, be accommodated: but mixed up in both countries as the Chinese and Tartars now are, it is inconvenient, to say the least, to have (as in fact often happens) to apply two Codes to the same case — with the result, that of two criminals equally guilty of the offence charged, the one escapes with a whipping, and the other, besides being bamboosed, is transported for life. The Chinese insist on *even* justice; and with unequal laws, it is impossible to obtain it.

* * * * *

§ 13. There seems, however, some doubt as to the applicability of Tartar Law to cases which occur within the Eighteen Provinces (as distinct from the rest of the Empire). Thus in the case of Pao Chih-chia 包只夏, where the parties were Mongols, the Board laid down the principle, that the question as to

Doubt as to applicability of Tartar Law to Eighteen Provinces.

Special Mahomedan laws relate to Mahomedans only.

which law was applicable depended upon whether the offence was committed in Mongolia or within the Eighteen Provinces (Chihli being the province in the case in point). In the same case, the Board also ruled that the special laws relating to Mahomedans applied to Mahomedans only, and not to Chinese concerned with them. So if two Mahomedans and a Chinese commit a robbery, the Mahomedans, under the Mahomedan law 'where three or more 'etc.', incur the penalty of military servitude, and the Chinese, under the Chinese law 'where several persons are concerned etc.', incur transportation only (P. A. S. P. vol. XVI. p. 35; *v.* also the case of Ch'ang Hsiu 長囚 P. A. S. P. vol. XIX. p. 1).

* * * * *

Predominance of the Law.

§ 14. As here the law prevails. Every Chinese is within the law, and though it is true that certain classes and individuals are for different reasons treated more tenderly or, it may be, more severely, than others, this is a perfectly legal treatment prescribed by and incorporated in the system. Furthermore, in regard of the

Code itself, because one part is entitled ritual laws, another military laws, and so forth, it must not be supposed otherwise than that this is a more classification which has gradually arisen for the sake of convenience. Common principles of Chinese law — *e.g.* relationship — apply throughout the system, and though special circumstances have of course in numberless instances gradually compelled the alteration or modification of principles, this natural issue has been attained through the ordinary legal channels.

* * * * *

§ 15. There is a special practical phase of the subject deserving attention — *i. e.* the absolute sovereignty of the Law within its own realm, and its instant repression of encroachment. The question most often arises in connection with the military — military interference is not tolerated. Thus a sergeant one day, while on his rounds, caught a gambler, and instead of handing him over to the magistrate for punishment, he ordered his captive to be flogged on the spot — and the latter, being in a poor state of health, died in

Law intolerant of interference.

Military interference not tolerated, for example.

consequence. For this, the sergeant was sentenced to one hundred blows and three years' transportation; and — which seems harder — the soldiers by whom the flogging was administered were sentenced to ninety blows and two years' transportation (H. A. H. L. vol. LX. p. 7). And in another somewhat similar case, another sergeant was sentenced to the same penalty as the former — although the man beaten hanged himself, and did not die directly from the flogging. It was most clearly stated in this latter instance that the sergeant was a military officer, and had no jurisdiction in a civil case (H. A. H. L. vol. LX. p. 8). The ground of the grievance, though remaining the same, may find a different expression. So in a case where a corporal received one hundred blows and three years' penal servitude for beating a sleeping sentry with his watchman's pole — whereby the sentry died. The grievance herein was twofold: — he did the act 'himself 自用巡夜鈎桿疊毆, 'and a thief-catcher's pole is not a legal instrument with 'which to inflict punishment' 而鈎桿究非

應用刑具 (H. A. H. L. Supp. vol. XVI. p. 44).

* * * * *

§ 16. Some attempt at the substitution of martial for the ordinary legal tribunals may perhaps be discovered in that section of the Code which provides that in the case of certain offences by military individuals and under certain circumstances a military officer may exercise a concurrent jurisdiction with his civil comrade (*v. Part. I — p. 9*). For the legal archaeologist this is an interesting enquiry: the practical lawyer will see that the treatment is a perfectly legal one, prescribed by and incorporated in the Code, and subject to all the ordinary rules of Chinese Law.

Special concurrent military jurisdiction is no exception to rule.

* * * * *

§ 17. There is, however, a characteristic feature of the Chinese polity, which might, at first sight, be considered to be antagonistic to this legal sway.

The Chinese family and clan system.

As is well-known, there is a considerable amount of local self-government in China. In its simplest form, there is the self-government exercised

by the head of a family: from this has been evolved the self-government exercised by the head of a clan. The authority of a parent or grandparent is, touching family matters, paramount within the family: and as the family increased in numbers and became a clan, the authority passed to the most capable member — usually a *literatus*. So we find throughout China groups of persons subjected to a very real local authority. But the effect of this liberal admixture of local government upon the general system has been misconceived: it is commonly supposed to have all the force of an *imperium in imperio*. The family or clan is, however, much in the position of an English corporation: with powers, *within certain limits*, to frame bye-laws: subject to have its local regulations construed by the ordinary tribunals: and liable to the ordinary law for exceeding its powers. As the innermost of two concentric circles is of necessity bounded on all sides by the outer, so is the family or clan circle encircled by the law.

*Not antagonistic
to the supremacy
of the law.*

* * * * *

§ 18. Nextly as regards a wide reaching effect of this legal domination. A subject of horror to foreigners is the apathy with which Chinese generally will stand by and see offences committed. It may be partially true to explain this away in the usual manner by attributing it to languor; but it would be more correct to say that it is due to fear of the Law. It is laid down that persons must not interfere unless they have a *right* to do so by reason of relationship (*q. v.*) or otherwise (*v. Principal and Accomplice — end*). So in a case wherein two ruffians attempted to ravish a certain man's wife during his absence from home. A neighbour and some friends, attracted by her cries, went to her assistance, and one of them stabbed a ruffian — who turned quickly upon his assailant, but was thereupon knocked down and killed. The Governor, on the case coming before him, decided that the act was perfectly excusable; but the Judiciary Board insisted upon the man getting several years' imprisonment, on the ground that he had no right to interfere and also, apparently, that after the ruffian had been knocked down his assailant (not content

*Chinese apathy
in presence of
crime a legal
effect.*

with his knife) had struck him with the weapon he wrested from him.

* * * * *

Political expediency naturally overrides law.

§ 19. There is however a force which will, if need be, override the Law; for it is provided that the Law may, and indeed must, be modified if political expediency so requires. Thus in a well-known case concerning the ranging of banner-men in Ili it was laid down that these favoured ones may trap and wander from place to place, feeding their herds and, provided they report themselves within a year, their name will still be retained on the roll — although the law runs to the contrary (H. A. H. L. Supp. vol. II. p. 8). The reason is clear: these men are enabled to make a living and become good shots — their predatory instincts are satisfied, and their services will be at the disposal of the State in future need.

* * * * *

Chinese policy not encouraging to growth of professional class.

§ 20. Though however a legal spirit is prevalent, the Chinese system does not seem favourable to the growth of a professional class trained in the law — indeed it seems to be the policy to discourage any such result. No counsel appear

in a Chinese Court. There are no persons corresponding to solicitors. There are, however, individuals somewhat answering to licensed notaries, and whose business it is also to prepare any statements or petitions that may be necessary. These individuals are styled *tai shu* 代書, and are admitted to the position after undergoing a formal examination held by a magistrate at his office. There is also a respected class of bookmen styled *shih i*, who pass their days with forensic problems, and whose assistance the officials occasionally require. But the existence of the latter class is of a semi-official nature; and touching the former class, even the mere preparation of statements etc. (although by licensed persons) is not welcomed. So in one case a person was sentenced to three years' transportation for merely drawing up six several petitions for six different clients (*v.* case of Ch'ên Yü-t'ien 陳玉田 H. A. H. L. vol. XLIX. p. 70): and in another instance a similar penalty was inflicted on the offender — although he was over seventy years of age — for also merely drawing up five petitions — absolutely innocent in themselves (*v.* case of Hsü Hsiao-

ch'uan 徐學傳 *id.*). Advocacy, too, would seem to meet with no favour, a well-known instance being that of a scholar named Hsü Yüan-yüan 徐願遠, who was sentenced to two years' imprisonment and eighty blows of the heavy bamboo, for trying to bring a criminal's offence to manslaughter instead of to murder (H. A. H. L. Supp. vol. XVI. p. 30).

* * * * *

*Natural paucity
of legal literature.*

§ 21. It naturally follows that since the practice of the Law is not greatly encouraged the incitement to write treatises thereon is comparatively poor: there are indeed few publications exactly resembling our own Law Reports, published by Authority, and reviewing every case of interest. The most vital cases are, as has been shown, published — but scarcely in our sense, and certainly not for the information of the 'profession'. Private enterprise has not however been utterly damped, and such reports and commentaries as do exist reflect much credit on their writers and exhibit considerable acumen. Especially is this the case with the Criminal Law, regarding which there

exist many voluminous collections — frequently published by Authority (*infra*).

* * * * *

§ 22. This short-sighted policy has reaped, *Effect of policy.* and is reaping, its fruit. With a nearly perfect system, the Chinese have few who thoroughly understand its 'inwardness'. The Code does indeed provide that a yearly examination shall be held of those whose duty it is to administer the law, and such an examination is apparently in theory of a searching nature; but how can an examiner examine, or an examinee be examined, properly, when their knowledge of the subject is confined to a sudden acquaintanceship thereof at very probably an advanced age? It is not to be thought that the system does not work well *under the circumstances*, but it does not work as well as was intended, or as well as it would work under more enlightened supervision.

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§ 23. Having thus briefly examined the source, *Review of the Criminal Law.* the state, and the general effect of the legal atmosphere in China, it remains to examine in

slightly further detail a few peculiarities of the chief component thereof — already touched upon incidentally. The term ‘chief component’ is used advisedly, for a marked peculiarity is the fulness of the Criminal Code, and the almost entire absence of any exact system with regard to Civil cases; and whereas it is extremely difficult to find authorities in regard of the innumerable questions of civil rights and laws of property, there are numerous collections of leading cases illustrating the Criminal portion of the Law and accompanied by valuable commentaries 辭語簡畧.

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*Is not so bad as
it is painted.*

§ 24. As regards then the Criminal Law of the Chinese, although the allowance of torture in the examination of prisoners is a blot which cannot be overlooked, although the punishment for treason and parricide is monstrous, and the punishment of the wooden collar or portable pillory is not to be defended, yet the Code — when its procedure is understood — is infinitely more exact and satisfactory than our own system, and very far from being the barbarous

cruel abomination it is generally supposed to be.

The punishment for every serious offence is *For example.* fixed with absolute certainty; and mitigation (where there appear to be *circonstances atténuantes*) is left, not to the judge, but to the Judiciary Board — appropriately styled the Supreme Court for the Revision of Sentences, and commonly called by foreigners the Board of Punishments.

The position of a judge in a Chinese Court *Position of a judge a strange one.* is certainly, according to our ideas, a strange one. The judge in criminal matters has nominally no latitude. He has to determine what the facts are, and what article of the Code those facts agree with. The Code, then, constitutes of itself an impregnable barrier to any expansion of authority, and — it must be admitted — an equally impregnable barrier to the growth and application of forensic genius.

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§ 25. One clear advantage, however, of the Chinese method in this matter is its inherent consistency — a point on which it may be advantageously contrasted with our own system. *The Chinese method herein consistent: examples.* For example, there are in England only three

categories of homicide — felonious, justifiable, and excusable — and, *c. g.*, the amount of punishment for manslaughter is left to the decision of the judge. In China there is a special article for every known form of killing, and, where the case does not seem to exactly fit any of the precedents, provision is made for a conviction under the clause most nearly approaching the circumstances — the punishment being either increased or diminished by the Board as justice seems to require. For instance, among the various forms of killing, there are: — deliberately planned killing *mou sha* 謀殺, killing with intent to kill *ku sha* 故殺, killing without intending to kill the person killed *wu sha* 誤殺, killing in course of an affray *tou sha* 鬪殺, killing by utter chance *shih shou sha* 失手殺, etc. etc. etc. To each of these varieties a different penalty attaches: and if there should arise a case of killing containing novel features, the circumstances will be considered in view of the stated form of killing most nearly applicable.

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§ 26. To attain consistency in the penalty, *Standard of penalty.* the Chinese jurists have found it convenient at the outset to use some definite standard therefor. Accordingly in homicide each case thereof is in effect reduced to one of the three primary denominations of the offence — *i. e.* killing deliberately, killing intentionally, and killing casually; and the proper denominator having been obtained, the case is made somewhat better, or somewhat worse, in accordance therewith. And so of other offences; as for example, robbery, embezzlement, and swindling etc. — where each case is in effect reduced to the standard of simple larceny, somewhat better, or somewhat worse, according to the circumstances.

* * * * *

§ 27. In regard of capital sentences, it is to *Capital sentences most often not carried out.* be noted that the sentence of death though recorded, is in innumerable cases commuted as of course to terms of penal servitude, transportation to lesser or greater distances from the offender's native place, imprisonment, or even fine. Two instances may be given where no penalty is inflicted: — (*a*) utter accident unavoidable by

any exercise of sight or hearing (an obvious case): (b) the killing by a husband of his wife and her paramour at sight.

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Capital punishment varies in kind.

§ 28. And the manner of death varies. So in treason, the parricide, or murdering a husband, the prisoner is sentenced to what is called the 'lingering death' of being cut to pieces: in grave cases of treason the sentence may be aggravated by reason of the prisoner's relations being involved in the penalty of the crime — when the punishment is extirpation of the entire family (children under the age of puberty, who are emasculated, alone excepted). Again there is the punishment of immediate decapitation coupled with exposure of the head: immediate decapitation without more: immediate strangulation.

But it must ever be borne in mind that few of these sentences are actually executed, for in nearly every case a capital sentence must, before it is carried out, be submitted to the Board at Peking for revision.

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§ 29. There are also many other forces which tend to mitigate the rigour of the law — *c. g.* questions of privilege, of circumstances, and extraordinary measures, such as Acts of Grace. Thus if an official or a sole representative of a family commits an offence, he may be excused, and will certainly be treated leniently; and an offender actually undergoing punishment, such as a convict serving his sentence of penal servitude or of banishment to a penal settlement, may live in hope that his punishment will be reduced or remitted under an Act of Grace — a measure of frequent occurrence. Indeed this pleasing possibility extends to an offender considered worthy of death 罪犯應死 and so sentenced (*v. Acts of Grace*).

*Forces tending
to mitigation.*

* * * * *

§ 30. The death penalty is not confined to treason or murder — rape, kidnapping, robbery with violence or of chattels of more than a certain pecuniary value are all so punishable. Until the year following the Tientsin massacre in 1870 (although the law on the point was practically a dead letter) Christians who after having recanted

*Capital penalty
not confined
to treason or
murder; ex-
amples.*

and been pardoned relapsed, and members of certain secret societies, were, when discovered, treated as rebels, and meted out summary justice.

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*Accessories in
capital cases.*

§ 31. On the other hand, accessories to murder are not visited with the death penalty — unless, indeed, they be pirates or brigands, or where the crime is, in Chinese Law, particularly atrocious. Thus, if half-a-dozen persons be engaged in the killing, and it is uncertain who struck the fatal blow, the first striker is held to be the principal. In a deliberate murder, the planner, if he took any part in it, is the principal — and one life only is demanded for the one life taken. Indeed the principle of life for life is so far carried out to its logical conclusion, that if one of the accessories should chance to die in prison, the sentence of the man held responsible in the first instance is commuted.

* * * * *

*Law perhaps
less Draconian
than ours.*

§ 32. In general, then, the Chinese system may be characterised as less Draconian than our own; but in some cases it is more severe.

The Law distinctly discourages 'larking', and indeed games generally; and not only are the parties held responsible for accidents occurring in dangerous sports like fencing, boxing, or wrestling, but there is a case quoted in which three men playing at horse manage to tumble over in a heap on the roadway — and one of them, falling on the brassbound pipe in the pocket of him who lay undermost, was thereby killed. The Board declined to allow the case to be dealt with as one of misadventure, and insisted upon the smoker being sentenced capitally. An amusing case is that of Chu Yü-lin 朱玉琳, where a Doctor of the Hanlin College was found guilty of the dreadful deed of making merry with some friends amid wine and music during a time of mourning. The Doctor was sentenced to be bamboosed, and to be stripped of the robes of his degree (H. A. H. L. vol. VII. p. 28).

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§ 33. In closing this brief introduction, a few *Weak points of the system as a whole.* general words might be expected touching the weak points of the system both of the law and its administration, as a whole. The subject has,

in a measure, and incidentally, been discussed; but in point of fact in searching for the defects of a system like the Chinese, a dry-as-dust enquiry of the Code and Supplementary Laws is not recommended, nor should too great attention be directed to a self-evident administration. Palpable defects may be discovered by the former enquiry, and possible shortcomings by the latter: but what drawbacks there are will be found

To be found in innate features of the polity— for example, responsibility for the occurrence of crime. to be due — in great part — to certain innate and longstanding features of the polity. For instance, there is that characteristic evil — the system of responsibility for the occurrence of crime. In speaking of local self-government, it was stated that the favour entailed upon the grantees corresponding liabilities. The powers conferred must not be exceeded. But in addition to this natural and complementary liability there is a wider responsibility. Thus the head of a family is held responsible in a measure for the occurrence of crime within the family; and so also, in varying degrees, are the other members of the family. A similar responsibility attaches to the head or members of a clan. So, in time,

the responsibility has been attached to officials — who *vis-à-vis* those within their jurisdiction are somewhat in the position of a senior relation. Thus has become firmly rooted a characteristic and not very admirable feature of the Chinese system.

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§ 34. Obviously, as has been noticed by many *Evils of the responsible system.* European observers, the effect of the system of responsibility has been, upon the whole, extremely prejudicial. As one writer puts it: — “*less will be heard about crime, but more will exist.*” Two evil results are indeed at once evident. Firstly, proceedings touching crime will be quashed, if possible; secondly, the personation of the real offender by another will be permitted. Both of these contingencies frequently happen, have for long happened, and — notwithstanding Imperial decrees to the contrary — will, under the system, always happen. It is interesting to notice how at various times the Imperial Government has endeavoured to check any extension of the doctrine — as in the well-known edict of the 18th year of Chia Ch’ing, where, in answer to

a memorial, a proposal to make additional regulations holding magistrates responsible for grave cases of violation of filial duty was refused.

The defect of responsibility has been instanced, both as being characteristic and wide-reaching, and there are, of course, other blots of the same nature — generally extraneous to the stated law, but closely concerned with its administration.

* * * * *

*Chinese system as
a whole rather
a subject for ad-
miration than
ridicule.*

§ 35. On the whole, however, the Chinese system, both of law and its administration, may be safely regarded with considerable admiration.

In addition to some positive evils, there are dangerous inconsistencies, and many absurdities — again, generally extraneous to the stated law, and concerning either the construction thereof, or positive administration. The absurdities are, in their way, not less dangerous than the inconsistencies — for it has always been the custom never to take Chinese matters seriously.

PART I

ADMINISTRATION OF JUSTICE, PRACTICE AND PROCEDURE

CHAPTER I

SECTION I — PREVENTION OF CRIME — PRIVATE JUSTICE ETC.

It is first necessary to deal with these two preliminary considerations.

PREVENTION OF CRIME

It is commented on in our law books that it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort — that there is provision in them for obliging persons whom there is probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen.

It will surprise European readers to learn that this honour is shared by the much despised Chinese. Indeed the practice is wider than with

us, it being in the power of a magistrate, in any case where he is led to think it desirable, to make suspicious characters give security for their good behaviour, and to compel their relatives or neighbours to become responsible in seeing that they will carry out their undertaking. The document takes the form of a bond, somewhat answering to our recognizance.

No specific sum of money is mentioned in the bond — the punishment of fines, although it may be shown to exist, being looked on with disfavour — but it is the duty of the bondsmen to watch the principal, and, if there be occasion, hand him over to the Court for safe keeping — under penalty of being held parties to the offence committed by him and punished as accessories thereto.

Nay, without a special bond, the wardsmen and *tipaos* are bound to give information, or, if need be, arrest and give over to the authorities all bad characters within their ward whom there is reason to suspect.

The same responsibility attaches to parents and heads of families, with regard to those related to them, being within their influence.

Foreigners judge of Chinese Law by the trading towns where they reside, and where a large floating population drawn from every quarter of the Empire makes the maintenance of order particularly difficult; and where, moreover, the power and influence of the mandarins is further crippled by constant foreign interference. Strange as it may seem, however, there is far greater security for life and property in the majority of Chinese towns and villages than in our metropolis.

PRIVATE JUSTICE : PRIVATE ARRANGEMENT

Private justice. — A person may not take the law into his own hands, but the law will take into consideration the fact that the person had wrongs to avenge. To kill a thief, therefore, is merely considered as killing without warrant of the law, and although the penalty incurred is capital punishment, unless the circumstances are very aggravated, the sentence will not be carried out. Indeed, if a person kills another to avenge his father or grandfather, he will in the first instance only be sentenced to transportation. But the person

who so kills must have failed to get justice at the hands of the law. If the slayer of such person's father or grandfather was justified in so slaying, and has paid the penalty by law imposed, the son must not kill the slayer ten years afterwards — if he do so, the plea for commutation will not be admitted.

As the Emperor Ch'ien Lung remarks — “the object of law is to avoid the necessity for private vengeance, and, law once satisfied, it would never do to allow the individual to take further action.” In the case of Shên Wan-liang 沈萬良, the prisoner's father was killed while in the act of thieving, and the prisoner on reaching man's estate killed the slayer, although the latter had expiated the offence by serving his term of penal servitude. The plea for commutation was not admitted.

Private arrangement. — An offence touching the public once committed, a private mutual arrangement of the involved parties to hush up or compound the same, in neglect of the Courts, is illegal, the person whose offence it was sought to compromise becoming liable to an aggravated penalty for the substantive offence, and the other party in general to a penalty

less than the above by two degrees. Thus, if the compounding or subornation be of a capital offence **受賄私和**, the suborner becomes liable to a penalty less by two degrees than the aggravated capital penalty.

The Courts will, however, in ordinary cases often direct a party to 'pay up and settle the matter' **勸令服禮和息**, to 'apologise and make 'compensation' **陪禮允息**, or to 'pay something 'to stop the scandal' **陪禮寢息**: otherwise, indeed, the attention of the Courts would be taken up with unceasing trivialities.

SECTION II — BRIEF SKETCH OF SYSTEM OF COURTS ETC. —
MANNER OF CONSIDERING A CASE — PRECEDENT —
EVIDENCE — SENTENCE — APPEAL

BRIEF SKETCH OF SYSTEM OF COURTS

In regard of the channels through which justice is administered, it is provided that complainants shall, in the first instance, address themselves, either by complaint or information, to the lowest court having jurisdiction in the particular district to

which the complainants belong. If, for instance, the complainant belongs to the district of Feng Yang, the appropriate court to apply to for redress is the Feng Yang district magistracy. Thence from the lower court the case may proceed by regular gradation to a higher — to the prefecture, the intendancy, and so on, until the supreme Provincial Court is reached. From the Provincial Courts a case may proceed for revision to the Judiciary Board in Peking, and thence to His Imperial Majesty. The Judiciary Board (*v. later Superintendence, Revision etc.*) answers in a measure to our Court of Appeal, but in addition performs certain special functions of revision and superintendence. It is not true to consider this important department as a mere 'conduit pipe' for the conveyance of information to the highest authority. It has, on the contrary, definite duties to perform and wide powers, and stands immediately interposed between the high provincial officials — usually the Governor-General, Governor, or Provincial Judicial Commissioner — and His Imperial Majesty.

It is noteworthy that one officer exercises a concurrent civil and criminal jurisdiction and, with

one peculiar class of exceptions, the one court tries all causes that arise. The exception referred to is in respect of cases of larceny, adultery, assault, fraud, breach of pecuniary contract, offences against the marriage laws, and offences against real property laws, wherein the respective parties concerned are, on the one side, members of the military class, and, on the other, ordinary individuals, or wherein, though the parties on both sides are military individuals, one or more of the ordinary people are concerned therein, or wherein, though the parties on both sides are ordinary individuals, one or more military individuals are concerned therein. In such case, it is provided that the chief military official of the district, and the district magistrate, shall exercise a concurrent jurisdiction.

The sitting magistrate 承審之官 may call in to his assistance as many of his brothers as he pleases — there is no limit in this respect.

Informations etc. — It is an offence entailing corporal punishment to lay informations or complaints at a superior instead of an inferior court — unless indeed the latter refuses to receive the same. A judicial officer who refuses

to receive informations or complaints which are in order incurs a penalty varying with the nature of the offence involved (*v. Magistrate's duties*). To lay an anonymous information or complaint, an information or complaint, that is, which does not contain the informant's or complainant's proper name and address, even though the charges prove to be true, entails strangulation, and the information or complaint is to be destroyed.

Certain classes of persons are prohibited, either totally or partially, from laying complaints or informations. Crime, age, infirmity and sex are the usual reasons. Offenders in confinement are not allowed to lay informations or to make complaint on any matter whatsoever, save only as regards complaints against prison underlings *re* ill treatment, or informations regarding other offences committed by themselves or by accessories. Persons aged eighty years or over, or ten years or under, the totally infirm, and females, are allowed to lay information or make complaint regarding high treason, rebellion, lack of filial piety, murder, larceny, assault, and fraud concerning themselves or those who live under the same roof with them:

but in respect of other matters, and against other persons, no capacity is allowed.

MANNER OF CONSIDERING A CASE IN GENERAL

In a Chinese case regard is paid to three points, the facts, the circumstances, and the relative position of the parties. The first fix the character of the offence, the third the nature of the sentence, and the second are considered when it comes to carrying out the punishment decreed. The greatest importance, moreover, is attached by the law to the original cause 律嚴起意 — *c. g.* a case arises out of a claim for debt 索欠起釁.

In regard of the circumstances it is laid down that, in general, all the circumstances must be taken into consideration 衡情定讞, and the case carefully considered with regard to them 詳核案情, strict attention being paid as to whether they are somewhat graver 稍重 or somewhat milder 稍輕 than usual. But the *consideration* of circumstances does not, in general, concern the judge, for the judge, as has already been stated, has theoretically no latitude : his duty is to ascertain the facts, gather the circumstances and then find what

article of the code the facts agree with — so that the penalty may fit the circumstances 情罪相符.

Where there is no special provision exactly applying, the case is to be brought under the clause in the code providing for similar offences, a provisional sentence submitted for the approval of the Higher Authorities, and the penalty adjusted according to circumstances. Thus, there being no special statutes relating to the traffic in paddy at the capital, but merely a general provision that the traffic is contrary to law, the special provisions in regard of the traffic in cleaned rice are to serve as a guide in determining between one case and another. Cases such as these are leading cases 成案, and the *ipsissima verba* of the legal definition hereon may be interesting *i. c.* 成案 視係例 無專條援引比附加減定擬之案 “leading cases are leading cases to which “no existing statute exactly applies, and which are “decided on the lines of some clause more or “less applicable, with increase or diminution of “the established penalty.”

Where the offence is unprovided for in the Code, its last provision states that the offender shall be

treated as a misdemeanant, and suffer one hundred blows from the heavy bamboo — a provision not infrequently made use of in cases of doubt as to the proper treatment for a given case.

Circonstances atténuantes are taken into consideration, but not by the lower court — they must await the Autumn Revision. The lower court has simply to decide on the facts, and the clause they come under, while the Supreme Court at Peking decides on the character and circumstances of the offence. (H. A. H. L. vol. XXIV. p. 30).

PRECEDENT

This is an important consideration in dealing with a case, and the reverence that the Chinese have for it, is well shown in the following instance — the Emperor himself giving way (though not readily) to the Board, where the latter was in opposition. A man set fire to a farmer's ricks, and the fire spreading, some thirty-seven houses were burnt down. Naturally thinking simple transportation for life too light a sentence, the Emperor suggested trying the

offender as a pest to society, and sending him to military servitude. The Board, however, showed that the year before, in the case of a beggar who had burnt down some thirty-three houses, it had been laid down by the Shengking Board that the man could not be tried under any law but that of arson. His Majesty remarked "Very well, then: still there is a difference between 'thirty-three and thirty-seven.'" (2. case of Huo Kuei-ssu 霍貴廝, H. A. H. L. vol. LIV. p. 1).

The determination of the punishment due to a particular offence announced, as occasion arises, by special edict, is in respect of that offence only, and is not to be considered a precedent.

Although a sentence has been approved by the Board, it cannot be quoted as a precedent, unless it has been ordered to be circulated 雖有照覆成案並非通行定例不得混行牽引 (P. A. S. P. vol. III. p. 83), 遠年未經通行之案不得引以爲據 (P. A. S. P. vol. III. p. 28).

It is interesting to notice the constant clashing of precedents. In one instance the Board reproved

the Governor for allowing a man to plead that he had surrendered himself, seeing that to allow the plea was not only directly contrary to the wording of the Statute, but also contrary to a precedent they quoted. In his reply, the Governor fully admitted the justice of the reproof, but mildly justified himself for having fallen into error, by quoting cases approved by the Board in which the plea had been allowed. The Board, however, remarked that a precedent which has been once upset must not again be quoted. (P. A. S. P. vol. VII. p. 1).

EVIDENCE

Chinese Courts pay little regard to direct statements; the witnesses are not reliable — indeed often ‘dangerous’: and the duty of the judge is to wring the truth 研訊確情 out of those brought before him — not simply accept their statements, and decide according as what we call the weight of evidence seems to incline to this side or to that. Chinese Courts do not weigh evidence but, after a careful cross-examination 訊證, narrowly scrutinize it, and decide according

to the conviction of the judges. (v. case of Li Li Ch'i-chuan 吏其傳, wherein the evidence was simply set aside, P. A. S. P. vol. XIV. p. 53). 'A 'plausible defence' 狡飾之詞 has comparatively little chance, and the 'made up stories of the 'accused' 捏飾之供 are valued accordingly. In serious cases — as *e.g.* homicide — a regular enquiry may be held, and by way of checking the statements of the witnesses the wounds in a corpse will be carefully examined to ascertain if there are any 'undisclosed circumstances' 別情. But such an enquiry must be carefully distinguished from a *postmortem* (q. v.).

Persons allowed to keep silent by reason of their relationship to the accused, persons eighty years of age or over, children ten years of age or under, and idiots, are not to be allowed to testify, for they have no penalty to fear if they commit perjury. Every other person, male or female, may testify; nor is the prisoner himself excluded — for in Chinese Courts he is considered not only a good witness, but a most important one: and in this connection, if the prisoner be ignorant of letters and has aught to depose, it

is allowable to employ a disinterested person to write down his deposition — but a court official is not considered a disinterested person.

Employment of Torture. — Torture is of two varieties, legal and illegal. But two legal instruments of torture are recognised — the one resembling the old Scotch 'Boot', the other a finger compressor. Other forms of torture are strictly illegal, but are nevertheless often employed and justified by the authorities on the ground of necessity: in the result certain other forms have received legal acquiescence.

Torture is not, as the law is construed, to be employed without sufficient reason, and if it is, the officials are liable to punishment. Where, for example, a witness refuses to answer a question, or evidently perjures himself, instead of committing him for contempt, or prosecuting him for perjury, the Court is authorised to punish him summarily, by slapping his face, beating him on the outside of the thighs, or what not, as the case may be. Again where there is clear evidence of guilt, and the prisoner refuses to admit the justice of his conviction, the punishment due his offence cannot be carried out until he does so, and the application

of more severe forms of torture is permitted (H. A. H. L. vol. LIX. p. 5).

In certain cases, a prisoner who has been tortured will be allowed a corresponding deduction from the punishment he is sentenced to. Thus, if the prisoner has been beaten to a jelly in the course of his trial, or, as it is technically described, has been warmly 'questioned' 時逢熱審, it is taken into account in the punishment, and the number of strokes due is reduced a degree — instead of one hundred he is given ninety, instead of ninety eighty, and so on (P. A. S. P. vol. XX. p. 1).

The employment of torture by underlings is, on detection, heavily punished. Thus Ma Yung 馬鏞, a magistrate's clerk, was sentenced to transportation to an unhealthy settlement, for tying a man up by the thumbs, and beating him with the handle of a whip, so that he died. (H. A. H. L. vol. XVI. p. 45). This case is not, it is remarked by an authority, simply one of torturing a man illegally.

Members of the eight privileged classes, persons over seventy years of age, children under fifteen years of age, and those who labour under any permanent disease or infirmity, are not to be put

to the question by torture, but may be convicted on the evidence of witnesses.

THE SENTENCE

Sentences are to be determined by the latest published supplementary laws, and not by the original statute 斷罪依新頒例 (H. A. H. L. vol. XLIX. p. 31).

Supplementary laws take effect on the day of publication, and sentences are to be guided thereby, although touching transactions antecedent to such publication. Merely occasional statutes modifying the law have, however, no such retrospective force.

As regard capital sentences, in certain cases of doubt (*c. g.* of value of property stolen, of several offenders as to who is really the principal), the words ‘after the Autumn Assize’ are to be added to the sentence.

Delivery and record of sentence. — It is carefully provided that, if the sentence be capital or transportable, the prisoner, together with his nearest relations, shall hear it pronounced in open court, and that such protest as the prisoner,

or his relations on his behalf, shall make at the time shall be taken down in writing, with a view to subsequent investigation.

The final step, preceding execution, is to record 集録 the sentence — the original record being styled 原底集録.

Execution of sentence. — A sentence must be executed within a prescribed time, in cases where the local authorities have a right to execute a sentence without reference. In the case of corporal punishment, the period is within three days: in the case of transportation, the period is within ten days. As regards the majority of capital sentences actually to be executed, a special official is appointed by the High Authorities therefor, and is liable for wilful delay therein.

Magistrates who authorise an execution, without waiting for the Imperial rescript, incur a punishment of eighty blows. Furthermore, after the Imperial rescript has been received, a period of three days must elapse, before the sentence is carried out.

APPEAL

It is provided that where an inferior Court refuses to receive an information or complaint, or decides thereon unjustly, appeal may be made to a higher court. Cases of the latter category for the most part are, furthermore, subjected to revision at the Judiciary Board.

‘Unjustly’ it is to be noted means injustice in fact, and not what the appellant considers injustice.

It may be mentioned that every Chinese subject has the right to directly petition the Throne for redress, but from the natural difficulty of access this concession is in effect a dead letter.

SECTION III — SUPERINTENDENCE AND REVISION —
INEQUALITY OF ACTION OF COURTS

SUPERINTENDENCE AND REVISION

The important duties of superintendence and revision rest with the Board of Punishments in Peking 刑部, *alias* the Judiciary Board. The jurisdiction of this body is very wide; generally speaking, it busies

itself with the administration of the law throughout the land, stimulating the Provincial Authorities where necessary (*v.* nearly any issue of the Peking Gazette); specially speaking, it functions as the Court of Cassation in France — a most important part of its duties being revision generally, and, in especial, the revision of capital sentences. For the purposes of revision it commonly acts conjointly with the Judicial Committee of Criminal Revision 大理寺 and the Censorate 都察院, and not seldom comes into collision with one or other of these bodies.

A further duty which devolves upon the Board is to take due record of His Majesty's decisions *re* provincial appeal cases, and to acquaint the Provincial Authorities therewith.

Revision etc. generally. — When the Provincial Authorities have determined the facts of the case, and the statute under which it comes, a report is made to the Board 題奏盜文, which decides whether the right article of the code has been applied — whether, as it is phrased, the facts 'square' 'with the statute' 方與例意相符, or are 'in 'accordance with the statute' 與例相符: whether

the lower court 'is doing what the statute lays 'down' 係屬照例辦理, and whether, bearing these facts in mind, 'the conviction goes too far 'or not far enough' 罪關出入. The revision is of an extremely searching nature, and is discharged in a manner very far from perfunctory: every detail of procedure is examined, every circumstance considered. According to its discretion the Board either approves 照覆 the sentence or refers it back for reconsideration, accompanied possibly by some trenchant criticism, as *e. g.*, 'the deposition 'is absurd' 所供尤屬荒唐, 'has no application 'whatever to the case' 與案情毫不切當. In some cases, where two similar statutes apply, the Board corrects the record itself, but where the penalty fixed by the lower Court differs from that in the article under which (according to the Board) the case should come, the case seems to be invariably referred back for revision. The Provincial Authorities generally take the hint given them, but not invariably, and in some cases, where they persist in their original decision, it happens that the Board has to admit the justice of their reasoning, and confirm a sentence of

which it had originally disapproved. (H. A. H. L. vol. V. p. 63). Very frequently in plain language the Provincial Authorities are directed 'to come to another decision in accordance with the law' 另行按律妥擬.

The circumstances of the case submitted to the Board for its consideration should be 'set forth in detail' 詳敘, otherwise 'the Board will find it difficult to come to any decision' 本部擬難懸揣.

The Board has also the power of recommending the mitigation or otherwise of the penalty fixed by law, independently of the representation in most cases usual on the part of the Provincial Authorities. In ordinary cases, however, the consideration of extenuating or justificatory circumstances with a view to mitigation is thus dealt with. The Provincial Court collects and submits to the Board the entire evidence upon which they concluded that there were extenuating circumstances, it not being enough to merely mention them 如情節有可矜憫亦只可於疏內將可原情節聲敘明晰不得於定案時率行量改 (H. A. H. L. vol. XLIX. p. 22). Accompanying the evidence

there must also be a representation. After receiving the evidence and the representation, the Board, if it thinks the case one for mitigation, submits a memorial to the Throne to the necessary effect (*id.*). Where it is doubtful whether or not mitigation should be allowed, the Board must refer the case back to the Provincial Court for re-trial (Edict of 22nd year of Chi'en Lung, P. A. S. P. vol. VI. p. 10); but, even in such cases, the Emperor or the Board has occasionally altered a sentence without retrial.

The Board can also refer a case back because the judgment is contrary to the evidence, or because the evidence is insufficient. As regards false judgments, it is provided that an accurate and faithful report of the circumstances thereof shall be laid before His Imperial Majesty, and a special commission will then be appointed to try the same. The necessary correction will thereon be made in the original sentence, and the accuser and magistrate, if need be, punished.

If the Board forms a theory in regard to a case which does not square with the evidence, it refers the case back to be tried again, and,

as a rule, the second trial produces depositions in accordance with the theory formed (*z.* case of Li Hui-t'ien 李輝田, H. A. H. L. vol. LI. p. 72).

When the Provincial Court is in difficulty as to what article of the Code applies, it may take the opinion of the Board, and where there is no provision for the case, the Board will determine how it should be dealt with. Explanations of important difficult points are usually incorporated in Circulars 說帖 for the general information of the Provincial Authorities.

The Board has a ready method in dealing with cases submitted to it which contain unprecedented features — re-trial, with sentence in accordance with the Board's views. Thus in the case of Chia Tè-wang 賈德旺, wherein an offender had been sentenced to death for reducing his uncle to the condition of a helpless cripple 成篤疾. The said offender's name had already been submitted to H. L. M. two years successively, but passed over, when a petition was presented, alleging that the uncle had to some extent recovered, and being now merely permanently injured 成癱疾, it was submitted that the prisoner was

liable to transportation only. The Board declared that such a case was unheard of 尤屬從來所未有, and ordered a re-trial at which the man was declared promptly to be still a permanent cripple. The facts were that the uncle had to some extent recovered the use of one hand, the tendons of which had been cut. The Board however admitted that, if the uncle had been declared cured, the sentence would have had to be remitted (P. A. S. P. Supp. p. 11).

The Board is extremely firm in upholding any decision it has given, and represses unmercifully any Provincial Authority: and, though in respectful language, brings all its guns to bear on the Judicial Committee, when the two bodies differ. There is even a case on record, where the Board declined to alter a decision, though His Imperial Majesty himself twice in curt and cutting terms expressed his disapproval of it (v. case of M^{rs} Fang 方氏 H. A. H. L. vol. XL. p. 10).

Revision of capital sentences. — Having thus briefly dealt with the general jurisdiction of the Board, it remains to give a special note on probably its most onerous duty — the revision of capital sentences.

The vast majority of death sentences are submitted by the Provincial Authorities to the Judiciary Board 開單具題 for revision. Two lists are there made out, one of criminals who should by right be executed, and the longer one of criminals whose death sentence is merely formal. The second list is at once referred to the proper officers to determine on the commutation fixed by unwritten custom, and the Provincial Authorities are informed of the revised sentences. The first list is then written on a large sheet of paper thus :

A. C. D. E. F. G. H. I.
 K. Z. M. N. O. P. Q. R.
 S. T. U. V. W. X. Y. Z.
 A. B. C. D. E. F. G. H.
 I. J. K. L. M. N. O. P.
 Q. R. S. T. U. V. W. X.
 Y. Z. A. B. C. D. E. F.
 G. H. I. J. K. L. M. N.

not alphabetically, or by chance, but so that the names of those prisoners who are, in the opinion

of the Board, less guilty than the others are placed either at the corners or in the centre. The list is then submitted to the Emperor 開單請旨, who, with a brush dipped in vermilion, makes a circle on it at seeming, and to some extent real, hazard, and the criminals whose names are traversed by the red line are ordered for execution. The others remain on the list until the next year, but, if they escape the vermilion pencil for three years, their sentences are then commuted. This revision takes place annually in the autumn, and is often called and translated 'Revision at the Autumn Assize.'

There are some cases where the procedure above described may be dispensed with, the Code providing that the Governor of the Province may authorise the immediate carrying out of the death penalty. Rebels, pirates etc., are thus summarily treated.

INEQUALITY OF ACTION OF COURTS

The action of the Courts is not always equal — witness the cases of Hsia Shêng-pa 夏勝疤, and of M^{rs} I née Hsiao 易蕭氏. In the former

case the prisoner was sentenced to capital punishment for the murder of his niece, a child of ten, whom he stabbed to death in her sleep, designing to lay her body at a certain man's door, and get the latter held responsible for it, in revenge for a threat to report the prisoner to the Authorities for neglect of duty. The Board, however, reversed the sentence 駁令, there being a special statute applying which enacted that military transportation was the proper penalty for such offences, and holding that the prisoner's act, though brutal and cruel, was merely that of a stupid villager 愚民畏累一時窘迫所致 (P. A. S. P. vol. III). In the case of Mrs I, the Board insisted upon a certain aunt receiving capital punishment, for rolling a very abusive and thieving niece into the river and drowning her. The view held by the Board was that though the niece was indeed a thief, and her aunt had been forced to pay out money for her to hush up a previous offence, yet the crime of robbing her aunt was too trivial to justify the extreme measure taken (*id.*).

SECTION IV — PRINCIPAL AND ACCOMPLICE

PRINCIPALS, ACCESSORIES, ACCOMPLICES

Chinese Law recognises, Principals in the first degree 爲首, Principals in the second degree — hereinafter styled accessories — 爲從, and Third Parties 餘人. An accessory taking actual part in an offence is phrased 從而加功. One only can be held responsible as principal in ordinary cases, although in armed robbery from a house, all taking part in the crime are punishable, and no distinction is drawn between principals and accessories; and so, also, in such special cases as that of a relative arranging an illegal marriage at the instigation of the parties: and in the case of such heinous offences as adultery. But, in general, one only of several parties concerned can be dealt with as principal: and it is in general the originator who is so dealt with. Thus, in the case of Lo Yen-shêng 羅巖生, two men murdered another, and then ravished his wife. The originator was convicted as principal, and sentenced to immediate decapitation and exposure of the head,

the other to immediate decapitation only (H. A. H. L. vol. LII. p. 7). In another case, two men, purposing to ravish a woman, killed her, without achieving their object. The originator was held responsible as principal, although the fatal blow was dealt by his accomplice (c. case of the maid Ching Lu 景路家女).

If the person originating an assault is present and directs it, he, and not the actual parties to it, is held to be principal and capitally liable for fatal results; but if the originator is not present, the person doing the chief injury is held to be principal, and the person at whose instance 聽信肇釁 the fatal assault was committed is merely punished as an accessory, with transportation for life to a distance of 3000 li and 100 blows 威力主使人毆打致死以主使之人爲首下手之人爲從論又同謀共毆人致死下手致命傷重者絞監候原謀杖一百流三千里原謀與主使之分總以當場有無喝令爲斷 (H. A. H. L. vol. XXXVIII. p. 56). In robbery or theft by several, the planner, whether present or not, is

held to be the principal, although the plunder has been privately appropriated by others concerned.

If the person doing the injury is an *employé* of the principal, and therefore naturally under his influence, the case comes within the law on this point. So in the case of Niu Chung 牛忠, a landlord, and Ts'ui Kuang-chang 崔廣丈, a farmer, where the latter was held to be merely an accessory — though the fatal injury was certainly of his doing — on the ground that he was his landlord's farmer, accustomed to take his instructions, and bound to take his part when called on to do so (H. A. H. L. vol. XXXVIII. p. 57). The technical phrase herein is 'done by command of' 係聽從 〇〇 主使. If, however, the person doing the injury merely joins in the fray at the request of the other party, who has no authority over him, the case would be treated as a joint affray — for the party joining has done so of his own free will 甘心聽從.

To enable a person who commits an assault to claim the benefit of the statute which throws the chief responsibility for an assault upon the party by whose directions and compulsion the

assault was committed, it is necessary that the person who commits the assault should be free of all ill-will towards the person assaulted, and should be really in fear of the party by whose directions and compulsion he commits the assault, or subject to his authority in very earnest (c. H. A. H. L. vol. XL. p. 18).

To hire or incite another to the commission of an offence renders the hirer or inciter liable to the same penalty as is incurred by the offender 雇人誣告照誘人犯法與犯法人同罪 (H. A. H. L. vol. XLVIII. p. 81): on the same principle, if, at another's instance, a person commits suicide, the former will become liable as principal, and *a fortiori* if he supplies poison (case of Wang Wên-kuang 王文廣, H. A. H. L. vol. XXII. p. 41).

Where two criminals are convicted under different statutes, though engaged in the same enterprise, they may both be held to be principals 例應各科各罪各以爲首論 (P. A. S. P. vol. V. p. 61).

Where the person who plans an affair draws back at the last moment, the person who takes

the lead in his place is to be considered the principal 如造意之人臨時不行。何人臨時主意。以爲首論 (P. A. S. P. vol. V. p. 62). But if everything had been arranged by the planner, it may happen that no one can be held responsible as principal.

Where several thieves, running away from a robbery that they have committed, severally resist their pursuers, each is treated as principal under the clause of resisting arrest. Where, however, two thieves assist each other in resisting arrest, the one who inflicts the fatal wound, if there be only one wound, or who inflicts the first fatal wound, if there be several wounds, or — if there be no possibility of distinguishing between the gravity of the wounds — the one who uses an edged weapon, or if both use an edged weapon, the one who first strikes a blow, is held to be the principal (H. A. H. L. vol. XV. p. 52).

In the case of a fight with fatal consequences, the person who strikes the last fatal blow is ordinarily held responsible; but if the originator of the disturbance has inflicted a fatal wound, he is held responsible, though the death result from

another wound subsequently inflicted. So in the case of Tsou San-yu 鄒三友, where the victim undoubtedly died from breaking his neck consequent on being knocked downstairs by another person, but the responsibility was laid upon the person who had commenced the fight, on the ground that he had struck the deceased on what might have been a fatal place.

Where various members of the same household, males and females, are concerned in an offence, the responsibility lies with the males; but not in capital offences, and in such cases, a female who takes the leading part may be held liable as principal.

An accessory may incur more severe punishment than the principal, and indeed may incur a penalty when the principal escapes scot-free. The case of Yang Ts'un-chên 楊存眞 is an illustration of this. There, by direction of his mother, Yang strangled his sister, who had been caught doing what she ought not to have done. Yang was sentenced to 100 blows, but the Board did not think it necessary to inflict any punishment on the unnatural mother 不必科以罪名. Another

good instance is the case of M^{rs} Chang *né* Liu 張留氏 and Chang Tso-wên 張作文, where the woman for poisoning her children was sentenced to decapitation subject to confirmation, the man, for supplying it, to strangulation without reference (H. A. H. L. vol. XXIV. p. 48). An incongruous case is that of Chang Wên-kuang 張文光; the principal therein murdered his slave, and escaped with 70 blows and one year's transportation: the accomplices, though relatives, were sentenced to 100 blows and transportation for life.

Ordinarily an accessory, in the case of premeditated murder, is sentenced to death, or to transportation for life, — where such sentence would be applicable — after the autumn assize: but where the question of relationship (a subject which is dealt with later on) operates, the punishment is increased — as in the case of Su Yu-lin 蘇有林, whose sentence of death for helping his sister to murder her husband was carried out straightway (H. A. H. L. vol. XXIII. p. 59). A person who acts under his parents orders will, however, be shown some leniency, as in the case of Tan Pa Chan Hsieh 丹巴占血, whose sentence of death was

commuted because he had acted under his father's orders, and further because three people had already been executed for the affair (*id.*). This however is in reality merely an illustration of the general principal applicable to one acting under compulsion.

An accessory may even be brought in as principal. Two rascals planned a case of bogus suicide by hanging, and the one confederate delayed cutting his friend down until he was really dead. The survivor was convicted of intentional homicide and sentenced accordingly (H. A. H. L. vol. LI. p. 72) — a decision most closely resembling English Law on the point. On the other hand where a person assists another to actually commit suicide by hanging, by way of friendly office and with the full consent of the said suicide, the kindly friend will be treated as an accessory, and the suicide himself as principal (case of Hsien Hu-pên 閻護本, H. A. H. L. vol. XXII. p. 43).

Where, of several persons, one supplies the arsenic with which they propose to poison certain others, and the wrong persons are poisoned, the person who supplies the arsenic, not being present

at the time the poison is administered, is to receive one hundred blows and transportation for life, as a passive accomplice in deliberate murder (H. A. H. L. vol. XXIV. p. 45). If the poison fails, the murder being effected by other means, and provided it be the right person who is killed, then the person who supplied the arsenic is capitally responsible (H. A. H. L. vol. XXIV. p. 49).

A person is considered as an accomplice to a murder if it originated in his act, although he could not be said to have actually contemplated or designed the murder, or the murder was not committed in the way he designed. So in the case of Mrs Hsü *mée* Ch'üan 許全氏, wherein a wizard employed to bewitch a child knocked it on the head instead (H. A. H. L. vol. XXII. p. 41).

An eye-witness to a murder and highway robbery was, in a well known case on the point, sentenced to mitigated punishment as an accomplice, *i. e.* transportation, it being shown that he had caught the murderer, and then for money had let him go. A friend of the eye-witness, to whom

the latter narrated the circumstances, was in the same case bamboozed for not laying an information (H. A. H. L. vol. XXII. p. 57). Beyond giving information, however, a bystander does not appear to be under any obligation to interfere, or indeed to have any right to do so, and if, in coming to the rescue he, unintentionally even, causes the ruffian's death, he will be held responsible for it. A mere bystander must, however, be carefully distinguished from one who stands by and lends his countenance **附和助勢** to an affair.

In conclusion, it should be remarked that the law regarding Principal and Accomplice is so closely involved with the nature of a particular offence as not to be easily separable therefrom. Some attempt has been made to do so in the foregoing, but attention is drawn, in especial, to the law hereon in connection with such offences as homicide and larceny, and to be found thereunder.

SECTION V — ABSENCE OF MALICE — CONFRONTATION OF
OFFENDERS — COMMISSION OF SEVERAL OFFENCES —
PREVIOUS CONVICTION

ABSENCE OF MALICE

Where there is no malice, the case is in general entered on the list of Cases Reserved 緩決. Thus, in the case of Chang Erh-kou 張二狗, a consenting party, firstly, to the improper conduct of his sister, and secondly, to her putting her intimate out of the way, the capital sentence was in the first instance decided on, but, inasmuch as he had no malice in the matter, the case was entered on the Reserved List 尚無挾嫌貪賄別情照奏定章程酌人緩決 (H.A.H.L. vol. XXIV. p. 48).

CONFRONTATION OF OFFENDERS

Parties apprehended etc. within different jurisdictions. — Where there are several parties to a case, and some are apprehended within one jurisdiction and some within another, a form of local extradition applies. It is provided that so soon as it is discovered that any of the accessories

or accomplices to a case are in the custody of another jurisdiction, official requisition for their appearance shall at once be made to the latter, although the respective jurisdictions are entirely independent of each other, and such requisition shall in general be complied with within a prescribed period. If the trial of such accessories has already commenced within the jurisdiction to which they belonged, before such aforesaid requisition has been made, it is provided that the prisoner charged with the lesser offence shall be removed to the court in which the prisoners charged with graver offences are under trial: or, if the offences are of equal gravity, the few shall be transferred to the court which has within its jurisdiction the greater number: or, if the numbers are equal, the prisoners last accused shall be removed to the jurisdiction in which the first accusation was made.

If the distance between the jurisdictions exceed 300 *li*, it is however provided that each charge shall be examined and determined separately.

Treatment of other parties to a case where one party is still at large. — Where one of the parties to a case is still at large, and the chief

blame is thrown upon him by those who have fallen into the hands of justice, if there is sufficient evidence to straightway bear out the statements of the parties, they will forthwith be either punished as accessories or released, as the case may be. On the other hand, if, as is usually the case, no such evidence is forthcoming, the several sentences are not immediately carried out, but they are detained in prison pending his arrest, lest, when the case is finally disposed of, it should prove that they, and not he, should properly have been condemned as principals. As, however, it would be unfair to detain them for ever, it is in general the rule that they may be disposed of after three years, if their sentence be bamboozing merely, after five years if their sentence be transportation for life. The date from which the imprisonment commences is calculated from the date of confirmation of the sentence, and not from the date of arrest, and, in some cases, where sentence is deferred, a man is left to languish for twenty years, before he can claim to be sent to transportation, or if he has, as usual fallen in, meanwhile, with Acts of Grace and General Gaol Deliveries, before

he can be set free. In the case of joint larceny, and no matter whether the sentence be deferred or not, the rule is that not less than twenty years must pass before the sentence can be carried out.

In capital cases, execution is not necessarily deferred even though a man may thereby escape decapitation and mutilation, but a capital sentence for joint larceny (*supra*) will be postponed twenty years and, if need be, longer.

COMMISSION OF SEVERAL OFFENCES

Where an offender is convicted of two (or more) offences at the same time, he is sentenced on the graver charge, not on both 列載二罪俱發以重命. So, two officials, who had committed the offences of bringing in an offence as lighter than it was shown to be, and bringing a false accusation, escaped their full term of punishment for these, and were sentenced on another and graver charge of misappropriating large sums of public money (H. A. H. L. vol. V. p. 1).

The rule is one which operates curiously at times. Thus, in the case of Chang Ch'ing 張慶 two distinct offences were committed: the one,

gambling, the other, beating the man with whom the offender was gambling so seriously that he committed suicide. For gambling, the offender became liable to two months cangue, and for the other offence, to one hundred blows and three years transportation. Escaping the former punishment, according to the rule, the offender also escaped the latter, because he was the only son and sole support of a man over seventy years of age (as to which see later), and was in the end sentenced to only one month's cangue.

It may thus be regarded as sometimes of advantage to an offender to commit more than one offence.

It should be noted that, in determining which of several offences is the most serious, the penalty is the test, and although decapitation is a heavier punishment than strangulation, strangulation without appeal is considered heavier than decapitation subject to revision at the Autumn Assize (H. A. H. L. vol. XXIII. p. 58). The above question seems to have arisen in two instances in the reign of Ch'ien Lung; in both cases, the offender had committed two offences, the one, rendering him liable to immediate strangulation, and the other,

to deferred decapitation, and, though the point seems to have been decided, in both cases, by the issue of a special edict making the sentence immediate, it was at the same time allowed that immediate strangulation was heavier than deferred decapitation (H. A. II. L. vol. V. p. 2).

As regards several offences of equal gravity, an offender can, as a rule, only be sentenced upon one: but, in the case of two capital offences of equal gravity, the penalty may be increased. Thus, if the penalty for either offence be summary decapitation, exposure of the head will be added. To come within the application of this practice the offences must not be against the same, but against different statutes; hence in the case of Shao Ming-tè 邵明得, wherein the offender was guilty of successive rape upon two women, it was held that both offences being against the same statute the penalty could not be increased (H. A. II. L. vol. LII. p. 6).

If several offences are charged at different times, and the punishment of the first of the charges has been already inflicted, the latter charges will not subject the offender to further

punishment, unless of a more serious nature than the former, and then only the difference between the legal punishments will be inflicted.

The case of Lü Mei 盧美 is an interesting one. The offender in that case, in order to destroy traces of an abduction, set fire to a house in which he had committed the offence, and thereby caused the death of four persons in one family and two in another. The prisoner was found guilty of abducting a married woman, of malicious arson causing the death of two persons in one family, and of malicious arson causing the death of four persons in one family — being sentenced under the statute applying to the last (P. A. S. P. vol. XIV. p. 43).

Commission of another offence after sentence pronounced.—The general rule as to the commission of several offences seems, also, to apply where an offender commits a further offence after sentence has been pronounced — the punishment due the greater offence will always supersede that due the lesser. Where an offender has already been transported, whether temporarily or permanently, the punishment due the commission of a subsequent

offence entailing temporary or permanent transportation may be commuted for an additional period or additional service as the case may be. But, in general, in such cases, inasmuch as escape is usually involved, it is customary to merely punish this breach of etiquette: so a thief who, undergoing his sentence of transportation, runs away and commits a second theft, will merely be bamboosed or cangued for attempting to escape, and sent back to the original place of punishment. This latter leniency seems frequently to receive a strained application, as in the case of T'an Ya-fu 譚亞復, an offender transported for incorrigible theft, who ran away and committed no less than six several thefts of small amount: for this the offender received a year's cangue (H. A. H. L. vol. III. p. 75). In these cases also it is, however, the rule that where the offence committed by the runaway be of a more serious nature than that for which he is suffering punishment, he may, under special circumstances be tried for the former and sentenced anew to the graver penalty it entails (H. A. H. L. vol. XVI. p. 51).

PREVIOUS CONVICTION

By this is understood previous conviction for the offence in question and after the convict has been branded, though as regards the latter point it has also been counted a previous conviction where the criminal had been convicted of the same offence (theft) but excused the branding because the person robbed was a relation (H. A. H. L. vol. III. p. 53). The conviction also holds where the offender had been sentenced upon another and more serious count in the same indictment. (H. A. H. L. vol. III. p. 51).

The above seems to be very strictly construed, and even where a person is convicted of highway robbery a previous conviction for theft will not in general be taken into account (H. A. H. L. vol. III. p. 54 — *v. infra* however).

Hardened offenders. — The general rule on this point is a combination of those regarding the commission of several offences and previous conviction, *i. e.* the consideration of but one count of several and previous sentence on a precisely similar charge, and hardened offenders

are on the whole treated with considerable leniency. Of course the rule does not apply to capital cases, which stand by themselves, and if a person is a "Jack the Ripper", his family as well as he may suffer, or the capital penalty may otherwise be increased (*Commission of Several Offences*), be it in regard of homicide or other offence. Nor does the rule extend to larceny, for when a person is shown to be a professional thief and generally dangerous to the peace and good order of the community he may be dealt with either as an habitual offender in larceny 積匪猾賊, and sentenced to military servitude for life under the statute 匪徒區令事主出錢贖贓 (Case of Wang Hua-lung 王化隴, H. A. H. L. vol. XVI. p. 58), or as a dangerous rowdy 棍徒擾害, and sentenced to transportation for life (H. A. H. L. vol. XVI. p. 14). There must however be seven or eight cases of larceny or several previous convictions therein proved to bring an offender within the first category, and five or six cases and an element of violence to bring him within the second. In the case of larceny by several, two previous

convictions of the same persons will cause all therein to be treated as principals. It may be added that in Kwang-tung province an offender guilty of eight distinct offences, *whether* theft, robbery, holding to ransom, or extortion, will be considered as an habitual offender in larceny and sentenced to military servitude, and though the number of offences be but four or five, and any violence inflicted be but slight, yet the offender will also be sentenced to military servitude under the statute 搶竊拒捕傷人.

CHAPTER II

PUNISHMENT

SECTION I — ANCIENT PUNISHMENT — VARIETIES OF PUNISHMENT

ANCIENT PUNISHMENT

In the records of the period B. C. 2601, during the reign of Huang-ti, is to be found what tradition states to be the first instance of public execution. This was the decapitation, in the presence of the chief's own troops and of those of his rival, of a rash aspirant to the sovereignty. Hitherto when the chiefs disagreed they fought until one killed the other and dreamt not of taking prisoners, but henceforth it became the custom for the leader to sacrifice those who opposed him in more deliberate fashion. Brought out on an eminence where all might see him,

the man to be destroyed would be publicly beheaded.

By the time of Shun — B. C. 2248 — the penalties by which law and order were maintained were various, and had attained some sort of classification. The legal punishments at this remote period were as follows: — branding the face with a hot iron, cutting the nose (probably merely slitting the nostril), cutting off a foot (probably the present illegal torture of dividing the tendon Achilles), castration, and death. Shun introduced the commutation of these penalties to banishment, cangue, bamboosing, or simple fine, where there was possibility of doubt as to the guilt of the offender; where the offence was chance or accidental, he pardoned the offender; for a second offence the offender was to be sentenced to death. In his address to his Minister of Justice at his accession, Shun laid down that executions should be public: branding, mutilation, and castration, private: that exile should be of two classes — the lesser, within the empire, the other, for more serious offences, beyond the frontiers (much the same as it is now). An

instance occurred in this reign of four high officials being exiled, their offences respectively being contumacy, defending and taking the part of an offender, failure in a public mission, mutiny. In all these cases the exile was probably beyond the frontiers, for though in both the first and second instances the offence in itself was light, the position of the offender made it of a more serious nature, and a meet occasion for a public example. The penalty of exile indeed was a favourite punishment with the early rulers, and Yü, Shun's predecessor, is described as upon one occasion visiting the frontier states, the Botany Bay of those early times, and enquiring into and regulating the treatment of the exiles — a numerous population one would therefore conclude.

Under the Chou and Han dynasties — a millennium from B. C. 1122 — the legal punishments were death, castration, maiming, cutting off the nose, branding the forehead — in substance much the same classification as in the time of Shun. Transportation, though not mentioned in the list of the period, was also a

usual penalty, but had not yet attained its full importance as a legal punishment.

In spite of all limitations thereon, capital punishment seems to have been the current early penalty. Many historical, it may be legendary, fugitive references are made thereon, and with regard to its too frequent application — so of the Minister of Justice Li Li 李離 — *circa* B. C. 630 — who, afflicted thereat, promptly committed suicide.

VARIETIES OF PUNISHMENT

The legal punishments stated generally are as follows: — slicing to pieces until death (or ‘lingering death’, or the ‘slow process’, as it is variously termed), decapitation, strangulation, transportation for life or for a term, penal servitude, imprisonment, the cangue, the application of the bamboo, branding, fines (rather by way of commutation, however, than an initial punishment).

There are also other punishments countenanced, but not legally recognised *c.g.* exposure, castration.

The orthodox classification comprises five heads

of punishment 五刑, *i. e.* death, transportation for life, transportation for a term, the heavy bamboo, the light bamboo: the death penalty being divisible into two forms — decapitation, and strangulation: transportation for life into three forms: and the other varieties each into five forms.

Degrees of Punishment. — The division of punishments into degrees has been carefully adopted — the chief conveniences thereof being the facility thereby obtained for increasing and reducing penalties with uniformity and the assessment of equivalent punishment.

There are in all twenty degrees of punishment, varying from ten strokes of the bamboo to decapitation. Accordingly, if a sentence is increased one degree, the meaning is that the punishment shall be inflicted more severely by that one degree, if a sentence be mitigated one degree the meaning is that the punishment shall be relaxed by that one degree; a sentence of 60 blows of the bamboo increased one degree becomes 70 blows, and mitigated one degree becomes 50 blows, a sentence of transportation for two years and a half increased one degree becomes transportation

for three years, and mitigated one degree becomes transportation for two years.

SECTION II — CAPITAL PUNISHMENT — SELF-EXECUTION —
IMPROPER EXECUTION

CAPITAL PUNISHMENT

Of this there are various kinds.

The most ignominious of all penalties is *slicing to pieces 凌遲 and extinction of the family*. Here the offender is tied to a cross, and, by a series of painful but not in themselves mortal cuts, his body is sliced beyond recognition. The head of the offender is subsequently exposed in a cage for a period.

This punishment, known to foreigners as 'lingering death' is not inflicted so much as a torture, but to destroy the future as well as the present life of the offender — he is unworthy to exist longer either as a man or a recognizable spirit, and, as spirits to appear must assume their previous corporeal forms, he can only appear as a collection of little bits. It is not a lingering death, for it is

all over in a few seconds, and the *coup de grâce* is generally given the third cut; but it is very horrid, and the belief that the spirit will be in need of sewing up in a land where needles are not, must make the unfortunate victim's last moments most unhappy. In short, though the punishment is severe and revolting, it is not so painful as the half-hanging, disembowelling, and final quartering, practised in England not so very long ago. It should be added that if an offender sentenced to this penalty commits suicide to avoid it, or otherwise dies before it can be carried out, the corpse is cut and slashed as if alive. So in an instance wherein a son gave his mother a push, and killed her thereby; his elder brother thereon buried the offender alive, as some sort of satisfaction, but the authorities, deeming this inadequate, ordered the body to be dug up and sliced (H. A. H. L. Supp. vol. XII. p. 2).

Further, that a pernicious life may be utterly destroyed, and be doomed to starve in the spirit world without posterity to offer annually the tribute of wine and pork, on the smell of which spirits live, *his sons and grandsons are also executed, or*

if infants at the time of his offence, are emasculated, and so prevented from carrying on the race.

This punishment is inferior, considered artistically, to torturing a man to death, as for instance Damiens was tortured—burning the body and then scattering the ashes to the four winds. The destruction of the future comfort of the offender's ghost is, however, undoubtedly a refinement.

Simple slicing to pieces is a degree lower in severity than the foregoing.

Next in form of severity is *decapitation and exposure of the head* 斬決梟示, and in cases of rebels, pirates, etc., this punishment may be carried out forthwith on the scene of the offence or in the public market place. The criminal does not lay his head upon a block to be chopped off by an axe, but is placed kneeling with his hands tied behind him. One assistant holds him in position by the rope with which his hands are tied, another pulls his head forward, and with one stroke of his sword the executioner whips it off. The body is given to his friends, if he has any, or otherwise, is buried by the Provincial Governor: the head is put in a cage, and hung up in a public

place, to afford a text for perambulating moralists.

Simple decapitation without further formality 斬 comes next in severity. As has been before mentioned, in the case of ordinary capital offences, being sentenced to death does not by any means involve a certainty of a violent end; and so this punishment is of two classes, the one when the decapitation is certain 斬立決 — the sentence being carried out if the crime is rightly determined; the other where the decapitation is subject to the approval of the Board — the circumstances being considered at the autumn assize, and the penalty being carried out or not according to the result of this consideration. The former class may be styled simple decapitation certain, and the latter, a degree lower in the scale of severity, simple decapitation subject to revision — for though, as regards this latter designation, both classes (like nearly all death sentences) are sent to Peking for revision, in the former class, the subject of revision is not the facts of the case but the measure of punishment.

The punishment may, where necessary, be carried out forthwith — but this, in fact,

comparatively seldom happens, then only in exceptional cases, and by way of example.

Simple decapitation subject to revision at the Autumn Assize 斬監候 applies to a very large number of cases. The procedure has already been described. It remains to add that a comparatively small proportion of these sentences is carried out, though the offender has a very good chance of dying in prison while he is waiting for revision. The usual commutation of decapitation subject to revision is either to strangulation, or to military or ordinary penal servitude for a space of three years.

In view of the reason underlying a penalty which involves dismemberment, it is provided that this part of the sentence shall still be carried out, though the offender should have died in the interval (H. A. H. L. Vol. XLIV. p. 34) — the sentence is supposed to be carried out whether the offender be dead or alive, and it appears from the reports, in some instances at least, actually to be so. Thus, if the offender's name should chance to have been placed on the fatal calendar and ticked off by the Emperor, the fact that the

offender has died before the warrant for his execution has arrived, does not save his body from decapitation. In the case of Ma Hsiao-liu 馬小六 an offender who had been condemned to decapitation and to have his head exposed, died in prison before execution; the corpse was directed to be decapitated and the head exposed 業已監斃應令戮尸梟首 — (H.A.H.L. Vol. XIII. p. 66).

The lightest form of capital punishment is *strangulation* 絞, and, as in the case of decapitation, it is divided into two classes, the more severe — *strangulation certain* 絞立決 — and the less severe — *strangulation subject to revision* at the Autumn Assize 絞監候. Though supposed to be preferable to decapitation in respect of the future happiness of the victim among the shades, it is an infinitely more painful death. Here the executioner throws the victim down upon his face, and then sits astride him twisting a cord around his neck; then, as speedily as he can — though slowly in effect — he strangles his victim. If the executioner is not skilful, the experience must be worse than that of hanging prolonged, bad as that is —

notwithstanding patent drops and all the experience of science.

As in the case of decapitation, a sentence of strangulation subject to revision is seldom actually carried out, and the apparent greater proportion of actual strangulations than of decapitations to the number of sentences is due to the commutation of many sentences of the higher punishment to the supposed milder one.

SELF EXECUTION

In the case of High Officers, as a mark of special favour, the offender is sometimes allowed to carry out the sentence himself — either by hanging himself, or taking poison, as the case may be. In the latter case the offender is said to have ‘swallowed gold’, an euphonistic expression for a gilded pill, though it is strongly asserted by many Chinese and foreigners that gold leaf is really swallowed with fatal effect. A good authority — the Viceroy Yeh — has indeed asserted gravely during conversation that a lump of gold was in fact taken, the weight of which working through the intestines caused eventual

death. But, with all submission to so high an authority, it is believed that this statement is somewhat wanting.

IMPROPER EXECUTION

Where, in due accordance with a pronounced judicial sentence, an offender is decapitated when he should rightly have been strangled, or *vice versa*, or where the body of an offender is mangled or disfigured contrary to law, the magistrate will be liable to a varying number of blows.

Where a person dies consequent on improper punishment, the executioner will share the responsibility therefor, because it is assumed that if the underling had carried out the punishment properly, the victim would not have died (H. A. H. L. Vol. IX. p. 10).

SECTION III — OTHER FORMS OF PUNISHMENT — IMPRISONMENT ETC. — FINES AND FORFEITURES

OTHER FORMS OF PUNISHMENT

Transportation is a punishment very generally employed. It is of two forms, life transportation

流, and transportation for a term 徒. The former variety is divisible, according to distance, into three degrees — the distances being 2000, 2500, and 3000 *li* respectively. The latter variety is divisible, according to duration, into five degrees — the limits of time commencing with one year, and advancing by an increase of six months at a time until the limit of three years is attained. Probably the most usual form of transportation is that for three years.

The distance to which an offender is to be transported is calculated from his place of birth, and, in the case of transportation for a term, it is provided that an offender may not be transferred further than the boundary of his native province.

In a sense all distances of transportation are nominal, and certain distances from prescribed province to prescribed province are laid down for the varying degrees.

In addition to ordinary transportation, there is also military transportation divisible, according to distance, into four degrees — the mildest form commencing with a distance of 2000 *li*, and advancing by increments of 500 *li*, until the

distance of 3000 *li* is attained, and thence by an increment of 1000 *li* to 4000 *li*.

As is very evident the punishment is extremely flexible, and admits of varied fine gradations.

Cases of transportation are very numerous: it is a favourite punishment, and this because it rids the country of dangerous offenders, and either usefully employs them, or at least confines them to a given area; further, there are many commutations from capital punishments to this milder penalty.

In regard of transportation for a period, it is provided that an offender convicted of a second offence, while his first term is incomplete, may be sentenced to a further term, provided that the two terms together do not exceed four years
**已徒而又犯徒依後犯該徒年限仍
合應役通前總不得過四年** (v. H. A. H. L. Vol. III. pp. 49—54).

If an offender has been transported at the request of his lord or his parents, it would appear that, if the offence was not a very grave one, they may apply for permission for him to return — his punishment being then reduced to penal servitude,

and this in turn to one hundred blows and one month's cangue (*v. various cases* H. A. H. L. Vol. I. pp. 10—12).

By the original law of the dynasty, where an offender was sent into permanent transportation, his wife was sent with him. But this was found to give rise to many objections: if he died, his widow was left among strangers: if he lived, she was exposed to many temptations. It was determined, therefore, in the reign of Tao Kuang, that if the offender wished it, he might take his wife with him, but if not, he might leave her with her friends (H. A. H. L. Supp. II). The old practice, however, still applies in respect of permanent transportation for certain offences to Mongolia.

Penal Servitude is of five degrees varying from penal servitude for one year to penal servitude for life. Its usual position is as an additional penalty to transportation, there being certain penal settlements throughout the Empire whereat the offenders are put to work at certain useful objects, as in the provinces of Kwangsi Yunnan and Kweichow and, without the Eighteen Provinces, in Turkestan, and (until recently) Formosa.

This punishment is commonly divisible into three heads, penal servitude pure and simple, military servitude and domestic servitude. Examples of the first head are frequent and evident — not indeed unlike our own penalty. Military servitude 充軍 is of very varying descriptions: so an offender may merely be sent to military servitude on the near frontiers 發近邊充軍, or he may be sent to military servitude in the mines in Yunnan, Kweichow or the Two Kuang 發雲貴兩廣極邊烟瘴充軍. Domestic servitude, where an offender is sent into slavery pure and simple, is also of a varying nature; so the slavery may be in the household of some meritorious official comparatively near at hand, or it may be at some spot more remote, as in the New Settlements (Sungaria and Kashgaria) 發新疆爲奴.

The punishment of the *Bamboo* is of very ordinary occurrence, either as a penalty of itself, or as a portion of another penalty. The implement is of two kinds, styled the heavy 答 and the light 杖 — the former weighing roughly $2\frac{2}{3}$ lbs. as against 2 lbs. The light or lesser bamboo

constitutes, according to the Code, the lowest degree of punishment. The punishment is divided into five degrees, starting nominally with ten blows, and increasing by tens, until the nominal maximum of fifty blows is attained. The actual number of blows to be inflicted is, however, four, five, ten, fifteen, and twenty, respectively, for the five degrees. The punishment of the heavy or larger bamboo is also divided into five degrees according to the number of strokes — starting nominally with sixty blows, and advancing by tens, until the nominal maximum of one hundred blows is attained. The actual number of strokes to be inflicted is for the five degrees, twenty, twenty-five, thirty, thirty-five, and forty respectively.

The well-known punishment of the *Cangue* 枷號, familiar to all who have read anything about China, is commonly resorted to for lesser offences — though occasionally also for more serious ones. It consists in effect of a square wooden collar or frame, worn by the offender around his neck, and rendering him incapable of feeding himself. On the frame is written the name and residence of the offender, and the offence of

which he is guilty. A guard is placed in charge of the offender, who is stationed for a time in one spot, or perambulated through the streets, as his custodian may think fit. The punishment may be for any period — even for life — and is more severe than it might casually appear to be, for the lot of an offender restricted to a confined and helpless position, and exposed to a blazing sun in Southern China, or to a dust storm or gale in Northern China, cannot be a cheerful one.

Where an offender has been sent to penal servitude for life beyond the borders, and commits further offences, short of death, no aggravation of penalty would seem possible; so therefore, where it is not thought desirable to impose a capital sentence, the cangue is resorted to according to the following scale: — one year's cangue for a first offence; two years' for a second; three months' for a trifling robbery; one year for an offence involving transportation for a period; two years' for an offence involving transportation for life; three years' for an offence involving military servitude.

An offender may be cangued for life; as in the case of a secretary, who being sentenced to military servitude for life, knocked down a policeman with his chain, and tried to escape as he was starting for his place of punishment (H. A. H. L. vol. IV. p. 33). In another instance, another secretary was similarly treated, for having reverted to vagabondage after being pardoned (H. A. H. L. Supp. vol. IV. p. 35). In a third case, a bannerman Ch'ang An 長安 was so sentenced for striking his commanding officer (H. A. H. L. Supp. vol. II. p. 42).

Perpetual fetters is a punishment not infrequently met with; and there is a well-known case on the point, wherein a member of the Imperial Family was so sentenced for trying to smuggle in a couple of women when on his way to exile 求遠銷禁.

Not dissimilar from the two latter punishments is the penalty prescribed for thieving beggars and tramps in certain provinces — *i. e.* the wearing for varying periods of an *iron bar* of about 53 lbs. weight (*v. Larceny*).

Branding 刺字 is employed for the purpose of

identifying old offenders. It is ordinarily on the face, but (as in the case of juveniles) may be behind instead. A thief on a second conviction is ordinarily to be branded a second time, so that the number of convictions may be known; but an offender sentenced to a heavier penalty for robbery committed during the time he is serving his term of transportation is not branded, as it is not considered a new conviction.

IMPRISONMENT — PRISONS — PRISONERS — JAILERS

Imprisonment 監禁 did not, in the ordinary sense, exist as a punishment until a comparatively recent period (*infra*). The object of imprisonment seems to have been merely to retain persons in safe custody until their execution or acquittal as the case might be. It has gradually been introduced either as a mode of commutation, or as an initial punishment.

Imprisonment for three or four years, appears to have been devised in the second year of Tao Kuang, to meet those cases of offences by women, where the gravity of the crime seemed to render it advisable to prevent their escaping

with the fine by which in the ordinary course they were allowed to commute their sentence of transportation, and where at the same time sending them to slavery appeared unduly severe (H. A. H. L. vol. III. p. 39).

Chinese prisons are loathsome and horrible dens of iniquity and filth; but, horrible as they are, cases in which application is made for the release 釋放 of prisoners of twenty years' standing shows that they are not quite so awful as they appear to be (H. A. H. L. vol. XII. p. 35).

The regulations made for a prisoner's comfort (?) are not very numerous, but read justly enough. Thus petty offenders under sentence of the cangue, or offenders in confinement in a fortress, are to be allowed a *shêng* 升 — about a pint — of old rice a day, provided they are without other means of support. Ordinarily it would appear that their friends have to supply them with food. Prisoners are allowed a wadded jacket in winter, and medicine if they be sick — but not light or fire. If over seventy or under fifteen years of age, or if they be cripples, they are to be kept separate, provided with clean mats and bedding,

warmed beds in winter and cooling drinks in summer. Prisoners under sentence of death or charged with transportable offences are required to wear prison dress (a reddish brown suit). A prisoners's grandparents, parents, brothers and sisters, wives and children, are to be allowed to see him twice a month; but they must not be allowed in prison with him, and any food or other comforts must be given him through the jailer. Prisoners who have held the fifth or any higher grade of official rank, or who have previously distinguished themselves by their public services, have a right to freely see their relations or connections.

Prisoners may be sentenced to wear fetters or handcuffs during their term (a regulation applying also to transportation etc.) — *v.* case of Chang Kên-ch'ui 張根祿 H. A. H. L. vol. III. p. 77; but if their behaviour be good, and there be no black marks against them 無過之犯, these may be removed.

Jailers are held responsible for the safety of their prisoners as strictly as European warders — in some cases more so; thus in one instance a

jailer was punished for allowing a prisoner to take unintentionally an over-dose of febrifuge; in another, for allowing a prisoner to indulge in terrapin which proved poisonous; and in a third, for leaving a chopper behind in the jail kitchen, and thus enabling a prisoner to commit suicide. A jailer who allows a prisoner to escape is liable to a punishment graduated according to the importance of the prisoner and the general circumstances. Where a prisoner escapes through the negligence of jailers, the jailer, principally responsible, will be liable to a punishment two degrees less severe than that to which the prisoner had been sentenced: if more than one prisoner escape, the jailer, principally responsible, will in such case be liable to a punishment two degrees less severe than that to which the most guilty of the prisoners had been sentenced. Where the jailers have been overpowered, whether by the prisoners themselves or by an incursion of their friends, the above penalties are subject to reduction.

Ill treatment on the part of the jailers, whether by wounding their prisoners or suppressing the food allowance, is punishable — wounding, as

wounding in affray, and suppression of the allowane, as embezzlement of the same amount of Government stores.

FINES AND FORFEITURES

Fines 贖刑 as a form of initial punishment, apparently do not exist in China: where they are levied, it is by way of commutation when there is reason that the penalty affixed by statute should not be carried out. The practice is an ancient one, for in an edict of Mu Wang of the Chou dynasty (B. C. 952) it is stated *inter alia*, that where the balance of evidence is in favour of the prisoner, he is to be given the benefit of the doubt, and allowed to commute the penalty for a fine.

Possible, though doubtful, exceptions, to the general rule that fines are considered merely as a commutation, are in regard of the privileged classes and the stoppage of an official's salary for misconduct or *inertia*. In the case of the privileged classes offences are, as a rule, punished by a fine — though even in that case the fine is regarded as a commutation, and the sentence is,

death, transportation, cangue, or bamboo, as may be: while, as regards the stoppages of the salaries of officials for supposed want of vigilance or failure in the prevention of crime within their jurisdiction, such measures, though, in fact, a part of the general law, are rather, according to our English understanding, an official device affecting officials only.

Of a fine pure and simple, where a fixed sum of money is laid down in the Code as the penalty due the commission of an offence, there is apparently no instance. Chinese legislators would be shocked at the idea that a breach of the peace should be visited by a fine of forty shillings, or that no other penalty should attach to offences of greater heinousness.

Fines in general go to the Court, but in the case of accidental homicide or injury are paid to the relatives of the deceased or to the injured party, and they are in this case over and above the medical expenses etc. Where more than one person is held responsible for an accident the fine is made up between the various parties. Where there is more than one victim a double fine is imposed.

Forfeitures, whether to the State or to the person aggrieved, exist, but are not so common as, until lately, they were in our own country, in that felony *per se* does not have that effect — it is only in cases of treason or robbery from the State that the Government lays claim to the property of the offender. Further, in some cases of murder and arson, the goods of the offender are made liable to satisfy those by whom injury has been sustained.

SECTION IV — PUNISHMENTS NOT LEGALLY RECOGNISED —
UNDUE PUNISHMENT

PUNISHMENTS COUNTENANCED BUT NOT
LEGALLY RECOGNISED

Exposure until death: — This is a common treatment adopted in the case of notorious offenders. The offender is exposed in a tall cage, his head resting in a pillory on the top, and his feet resting on three tiles at the bottom — without food or water. The agony of this position in a blazing sun may, and frequently does, cause the victim

to kick away the tiles and strangle himself; but if he does not do so after some twenty-four hours have expired, a tile is removed — it being supposed to have been kicked away by the offender; and if the greater agony of standing on tiptoe is still endured, the second tile is removed the second night, and the third day the offender is found there dead.

The punishment is distinctly illegal, for an official allowing it, or ordering it to be exercised, is liable to heavy punishment for applying penalties unknown to the law. It is resorted to, therefore, only in the case of offenders whose crimes have made them objects of abhorrence, and where the authorities can count on being upheld by public opinion, and that no complaint will be made against them. The object appears to be the making an example where the man's offence, though capital, cannot be carried out until confirmed, and long delay would thus be caused if the proper course was followed.

The punishment is inhuman, but, in the words of a high official, when remonstrated with against so torturing to death three hardened offenders : —

“The men are atrocious criminals, and an example
“is necessary to stop the continuance of the crime of
“which they have been guilty. If these men are
“dealt with in the ordinary course, it will take a
“year, or perhaps two, before they can be executed.
“We cannot legally cut their heads off, so we
“confine them, and let them die.”

Castration: — It is commonly said that this is one of the punishments recognised by Chinese Law ; but it is hardly recognised — it is countenanced. It is a practice allowed, even ordained, in grave cases of treason, to prevent the continuance of a stiff necked and adulterous generation of traitors. The process is not inflicted on the offender in person, and only on the sons when they attain the age of sixteen, so that if they die before that age, they pass to the other world unmutilated.

UNDUE PUNISHMENT

In this regard distinction is drawn as to the manner in which the undue punishment was inflicted, the effect thereof, and the *animus* of the officials concerned.

And firstly the question of *animus* is important,

for if there be no evidence of feeling, and the punishment administered be that provided in the statute, though the victim die, the official who is responsible is only to be reported on, and a nominal punishment inflicted. In the case of Chu Lin-chêng 朱麟徵 an official was denounced for beating an impertinent *típao* to death, and it was by special decree ordered that a nominal punishment only should be inflicted, and that he should be retained in office (H. A. H. L. vol. LX. p. 38).

Where the responsible official parties have been moved by strife or anger or otherwise, the treatment is different. If the heavy bamboo be used instead of the light, but death does not ensue, the presiding magistrate will be liable to 40 blows: if death ensues, the magistrate will be liable to 100 blows — a sufficient sum to defray the expenses of burial being also forfeited. The attendant actually inflicting the undue punishment will incur, in either case, a degree less than the above penalties. Distinctions are also drawn as to whether bribes have or have not been accepted.

Furthermore, if a punishment be inflicted on a more vulnerable part than that required by law, so as to produce a cutting wound, the person who has inflicted, or who has caused to be inflicted, such unlawful punishment, becomes liable to a penalty two degrees less severe than in the case of similar injuries in affrays between those of equal standing. If death ensues the punishment is increased, and burial expenses forfeited to the family of the deceased. A person, who in such cases inflicts the undue punishment in obedience to orders, will incur a penalty less by one degree than his superior.

CHAPTER III

COMMUTATION AND MITIGATION

SECTION I — GENERAL CONSIDERATION — COMMUTATION GENERALLY AND SPECIALLY — CIRCUMSTANCES ATTENUANTES

GENERAL CONSIDERATION

This is a prominent feature of the Chinese system. The leniency may arise roughly speaking from three motives, considerations of equity, considerations of political expediency, and considerations of morality or religion. Thus the commutation of punishment prescribed by the Code in the case of various offences (homicide by misadventure, etc. etc.), commutation originating from *circumstances attenuantes*, etc. etc., in general arises from equitable considerations, and so also do commutations on account of lunacy, delivering

oneself up to justice, etc. The privilege allowed certain classes, arises from considerations of political expediency. The mitigation or commutation or special treatment provided in cases of sex, youth, great age, or a sole representative, arises from moral or religious considerations (though, as time passes, the motive tends to become equitable, rather than purely moral or religious). By religious, it must be understood, is meant the regard paid to the tenets laid down in Chinese philosophy generally, and, especially, the respect which the Chinese attach to seniors, the filial relation and family succession — the foundations of their religion, and the fabrics of their government. In addition also to certain fixed and definite reasons for commutation and mitigation, there must likewise be mentioned the Acts of Grace passed from time to time commuting and mitigating penalties : the cause of this, now a regular practice without other motive, was probably originally political expediency to gain popularity.

COMMUTATION AND ITS EFFECT GENERALLY
AND SPECIALLY

Where a penalty is commuted it is to the secondary penalty imposed by the law under which the particular case comes. But the effect is very varied. In some cases, where for surrendering to justice or other reasons one degree of punishment is remitted 減一等 it may merely mean that instead of being summarily executed, the execution is referred for consideration, or that instead of being sentenced to decapitation, sentence of strangulation is passed; but it may also mean that the penalty passes at a bound from decapitation and exposure of the head to simple transportation (H. A. H. L. vol. XXXII. p. 11), or to a lesser penalty (*c. g.* a fine).

In the case of accidental homicide the sentence of death is recorded, but is simply formal, and the penalty is commuted to a fine paid to the relatives of the deceased; in the case of accidental injury, the penalty is commuted to a fine paid to the injured party himself. When there are extenuating circumstances in the case of accidental

homicide or serious lasting injury, the sentence of death may be commuted to transportation, thence to a fine in lieu thereof. Passing attention may be directed here to that special commutation, accorded as a matter of course on claim made, in cases of murder where one of the capitally responsible parties dies in prison before the case is settled (*cf. circonstances atténuantes*).

There are also many other less important offences receiving as a matter of course ordinary or special commutation.

More than one statute in mitigation may be pleaded in the same case. Thus in the case of Ch'ên A-lien 陳阿輦 the capital sentence for homicide was commuted to transportation for life under one statute, and further commuted to transportation for three years under another. (H. A. H. L. vol. XLIV. p. 90).

CIRCONSTANCES ATTENUANTES

Justificatory circumstances 審非無故之情 are allowed as a matter of course in certain cases, sometimes arising from the mere conditions or circumstances under which an act was done,

sometimes from the mere position of the parties (*i. e.* relationship), and sometimes from both these causes combined.

Examples of the first category are very obvious; — a man in self-defence kills an assailant who attacks him with murderous intentions: a person who has a right to interfere seriously injures an offender he is trying to seize: or of another class where an offender in certain offences stops short of the commission of the full offence (*v. Robbery and violence*), or the case of persons taking a minor part in the commission of a serious offence.

Examples of the second category are extremely numerous, arising chiefly in cases where the position of the parties is that of parent and child, husband and wife etc. — instances of this class will be found under these headings, and in various parts of this volume.

Examples of the third category are also numerous. Thus if a husband catches the paramour of his wife or daughter in the act, and in the first heat of righteous indignation or without deliberate intention 實出義忿 he kills him, the circumstances will be allowed. Not so, however,

if the said husband ties up the villain and cuts his throat, because he was abusive (v. case of Tu Lai-chang 杜來章, H. A. H. L. vol. II. p. 29). Nor where a person chances to kill a man he catches with his brother's wife (v. case of Lo Chin-ling 羅錦綾, H. A. H. L. vol. II. p. 30). Again justificatory circumstances will be allowed as a matter of course when a man kills his wife intentionally or unintentionally, if she is shown to be guilty of unfilial conduct to, and abuse of, his parents: or when she commits adultery without his connivance: or where she does him actual bodily harm, if he kills her in the heat of the moment.

And so also of other offences.

Delivery up to justice. — If before an offence has come to light, the offender himself lays an information, or his near relatives with or without his consent hand him over to the authorities, he will escape the penalty due his offence. But in such cases the confession must be full, and the person must deliver himself up in very truth 若自首不實及不盡之以不實不盡之罪罪之 (H. A. H. L. vol. IV. p. 59). If there be injury to life or limb the rule does not

hold in entirety — but even in this case the offender will merely be punished for the simple killing or wounding, as the case may be. So in an instance where a man burnt down a straw shed belonging to one against whom he bore a grudge, causing thereby the death of a child who was sleeping within, a fact of which he was ignorant. Running away he met his elder brother, and told him what he had done. The brother handed him over to the authorities, who could make nothing out of the case. As the offender did not know the child was within, it could not be said to be a case of deliberate killing **律以故殺既失原情**, and as there was no struggle, it could scarcely be called killing in course of a fight **乖相爭爲鬪之義**. The Board, however, being appealed to, at once laid down that it was a case of killing consequent on malicious arson: as regards the property destroyed the law allowed compensation **於物尚可賠償**, and as regards the child it was simple homicide only (i. case of Ch'ao Erh **趙二**, H. A. H. L. Supp. vol. XIV. p. 49).

Where it is the culprit's relations that deliver

him up to justice a curious result may follow. Thus where two brothers were concerned in a case, one gave himself up to justice, and at the same time betrayed his brother's hiding place, and both of the brothers were allowed to benefit (H. A. H. L. vol. IV. p. 58).

The delivery to justice must take place before a complaint has been made, otherwise a mitigation only of one degree less than the due penalty will be allowed (H. A. H. L. vol. XIV. p. 76). It will not be sufficient that the culprit give himself up, if he knows that a charge is about to be preferred against him 知人欲告而自首者 蓋既已知覺既不得謂事尚未發雖 首在事主報官以前亦應以聞拿投 首論 (H. A. H. L. vol. XIV. p. 81). But he will be entitled to full benefit if he did not know that the charge was about to be preferred, though it has actually been filed before he gave himself up, if penitence and not fear influenced his action (*id.*).

If the injury be irreparable, the fact that the culprit delivered himself up will not avail him.

(H. A. H. L. vol. XX. p. 50). So in the case of Po Yu-nan 播友南 where a man defiled a grave (P. A. S. P. vol. VII. p. 1).

An *accessory* will be entitled to mitigation of his sentence, if he gives information leading to the arrest of his principal, but it must lead to the arrest within a given time, ordinarily a year. (H. A. H. L. vol. XIV. p. 82).

A very curious case is that of Hsü Ch'ung-wu 徐允武, showing the strange bearing the parental relation may have on the subject. In this case the offender was guilty of hushing up for money the murder of one of his sons. Another son brought the case to light, and it was held that the father might benefit and be excused, while the son on the other hand was sentenced to one hundred blows and three years transportation for denouncing his brother's murder, because in doing so he had brought his father into danger of the law. (H. A. H. L. vol. XXXVI. p. 56).

Special commutation in homicide where one offender dies in prison before the case is settled. — This curious form occurs in the case of murder, where the person, who planned the offence, or one of

the accomplices, who had inflicted serious injury on the deceased, chances to die in prison before the case is settled, when the actual murderer can claim that the capital punishment to which he is liable shall be commuted to transportation for life, on the ground that life has answered life: but the person who dies must be one who might have been capitally liable in the case, and he must have died in actual custody and not while out on bail, again he must have died before the case was settled (case of Hou Mêng-pu, 侯夢卜, P. A. S. P. vol. XXV. p. 10).

SECTION II — MENTAL AND PHYSICAL DISABILITY — AGE —
SOLE REPRESENTATIVE — WOMEN

MENTAL AND PHYSICAL DISABILITY

Relatives are bound to report cases of *lunacy* 瘋病, and exercise strict supervision over the lunatics, under penalty of eighty blows heavy bamboo, if the lunatic kills himself, and one hundred blows if he kills anyone else (H. A. H. L. Supp. vol. X. p. 57) — *v.* Statutes 不應重律 and

知人謀害他人不既阻當律. It is doubtful if they are liable where the access of lunacy is sudden and unexpected. Lunatics are in general required to be manacled, and the relations must not remove the manacles without proper authority (H. A. H. L. vol. XXXII. p. 78). If the relations of the lunatic represent that they have no proper place of security, the magistrate will take charge of the lunatic. Lunatics are not to be released on the plea of recovery until after the expiry of a term of years, unless at the special petition of their parents, and after enquiry as to the ability of the latter to prevent their doing injury thereafter.

Lunatics are held responsible for their acts, but the ordinary penalty applicable is commuted as, *e. g.* in murder to imprisonment with fetters subject to H. M.'s pleasure. In the case of a lunatic who commits a fatal assault and has recovered at the time of trial, it is essential that the lunacy should have been reported before the offence was committed 先經報官有案: or otherwise the family of the deceased must assent to the verdict 取屍認切實甘結, the sentence

of death will be recorded (H. A. H. L. vol. XXXII. p. 57), the penalty therefor will be commuted to a fine of Tls. 12. 42, and the lunatic will be imprisoned in perpetuity. If the lunatic recovers, and there is no appearance of any recurrence of the malady within a fixed time, he will be given in charge of his friends and released: but a fixed time must elapse, and mere proof of cure is insufficient (case of Liu Chin-liang 劉金良, P. A. S. P. vol. XVII. p. 39). The time by law was originally twenty years, but if the lunatic be seventy years of age or upwards, or in failing health, the term is reduced.

Where the question of relationship comes in, the special laws for the benefit of lunatics are in a measure overridden; but though the crime be heinous in the last degree (save in one instance — *fin*) a special confidential report is to accompany the sentence, the penalty is then invariably commuted to death subject to revision and further commutation, and, in point of fact, is never carried out. This treatment moreover holds where the malady was transitory. In the case of M^{rs} Chung née Huang 鍾黃氏, a woman murdered her daughter-in-law

during a fit of madness from which she subsequently recovered. For this (after representation) she was sentenced to a commuted penalty of one hundred blows, redeemable by fine, given to her friends to take charge of, and the magistrate directed to see personally that the proper manacles were put on (H. A. H. L. vol. XXXII. p. 73). Even where a wife kills her husband, a case in which it was for long a moot point whether any representation could be made, it is now provided that though she is to be sentenced to the usual penalty, a memorial to His Majesty *is* to be presented by the Board in consultation with the Judicial Committee, if there is clear evidence of lunacy (H. A. H. L. vol. XXXII. p. 72). It must however be borne in mind that so far as concerns the *sentence*, lunacy is no defence: so if a lunatic wounds his father he must be sentenced to decapitation without appeal, but there is straightway made out the special report to accompany the sentence, which effects a change in the penalty to decapitation subject to revision at the Autumn Assize — when the case is further dealt with (H. A. H. L. vol. XLIV. p. 32).

Where, however, a lunatic deliberately kills his parents or grandparents, a representation will not serve. Here, by decree of the third year of Tao Kuang, he is to be executed at once on the spot where the murder was committed, if it be within 300 *li* from the provincial capital and no river intervenes, otherwise on the city execution ground without reference to Peking 恭請王命 既行正法 (H. A. H. L. vol. XLIV. p. 34). And the sentence (slicing to pieces) is to be carried out in all its horror, even though the lunatic be already dead; as in the case of Chiang Ch'ü-t'ien 姜聚添 where the quartering was ordered to be carried out, though he was certainly mad at the moment of the murder, and had been cut down and killed on the spot by his mother (*id.*).

Ordinary Acts of Grace and Gaol Delivery do not apply to lunatics, unless they have recovered and shown no sign of the recurrence of their malady for several years; and a lunatic guilty of an offence not ordinarily capital is not to be released because he is supposed to have recovered (H. A. H. L. vol. XXXII. p. 59).

Delirium. — This more temporary and

transitory form of lunacy is held to be no sufficient excuse for homicide — it being more often than not the result of personal indiscretion. In certain events, however, the penalty will be commuted or deferred in its execution. So in the case of Liu T'ing-jên 劉庭任, a man was sentenced to strangulation for killing another during the delirium of fever 照陡患瘋病猝不及報 and the execution was deferred (H. A. H. L. vol. XXXII. p. 57).

Physical Disability. — An offender under certain physical disabilities may, under certain circumstances, be allowed to commute the penalty of any ordinary offence that he may commit, and where guilty of a capital offence, he may in like manner be excused on payment of a fine. It is laid down that though a man whose right wrist is broken may be allowed the benefit of the act, the fact that he is deaf or dumb will not excuse him. The totally blind come within the act, but not the man with one eye (H. A. H. L. vol. IV. p. 16), or the man with one leg — the disability must be such as to prevent a person from walking or moving like others. Where a person is allowed

to commute the penalty of transportation for a fine, in view of a bad attack of rheumatism, he is free for good and all, though he recovers afterwards (H. A. H. L. vol. IV. p. 17).

AGE

In the case of great age, and in the case of youth, a certain tenderness is shown, and causes substantial mitigation in the punishment.

Aged offenders. — All persons aged seventy years or over are allowed to commute any penalty of or below the degree of transportation for life by a fine, in accordance with a fixed scale; but if, after they have once been allowed to commute the penalty, they intentionally offend again, the sentence will be carried out on the second conviction. Where the offender is over eighty years of age, still greater leniency is shown apparently. Such persons are to be recommended to the particular consideration of His Majesty, and very atrocious crimes are allowed to be perpetrated with comparative impunity. On one occasion an old man caused his victim to be burned alive: he was sentenced

to death: but placed on the deferred list (H. A. H. L. vol. IV. p. 12). So in numerous instances of ordinary murder cases, the aged murderer was merely punished with a fine. The reason given by an authority for this strange state of the law is that there is little fear of one so old again offending; so where a man of seventy set all his neighbours by the ears, and prompted them to bring false accusations against one another, the Board declared that the law should be carried out in earnest, and the old pettifogger sent to the hulks, where his unimpaired mental faculties could do no further harm (H. A. H. L. vol. IV. p. 15). A person aged eighty years or over will, however, be punished for treason or rebellion. Persons over ninety years of age are not, save also in cases of treason or rebellion, to be punished, in any case.

Juvenile offenders. — Under seven years of age, the offender will be excused save for treason or robbery. Under ten years of age — save in cases of treason or robbery — the offender is to be recommended to the particular

consideration of His Majesty. Under fifteen years of age, the offender is allowed to commute any penalty of or below the degree of transportation for life by a fine, in accordance with a fixed scale. Instead of a fine, whipping is ordinarily resorted to in cases of simple theft, however often the offence be committed; the commutation to a fine being reserved for cases of theft which involve transportation. Branding is not generally employed in such cases, but in Peking, and within the metropolitan area, if the offender is over thirteen years of age, and has similarly offended more than once, he is to be branded like an ordinary offender, and is further to be given in charge of his parents or friends. Such an offender is, moreover, to be treated as an old offender. (H. A. H. L. vol. XIV. p. 53). The branding, it is to be noted, is not to be on the face, but behind, and if the offender behaves well for five years, it may be obliterated.

The rule as to commutation for a fine seems also, under certain circumstances, to extend to capital penalties. Such sentences are, generally speaking, recorded, but under certain

circumstances, even where a child has killed another, this formality may also be omitted. The circumstances must accord with the case of Ting Ch'i San Tzu 丁乞三仔, wherein a boy of fifteen or under killed a man who treated him badly, and claimed to be exempt from the capital sentence. It was laid down that the man killed must be four years older than the lad (*scil.* at least), that he must be the aggressor, and must be unreasonably violent. In other cases, though the offender was fourteen years of age only, he appears to have been sentenced to death. But, in point of fact, the only rule on the subject seems to be that of common sense; if sympathy is with the juvenile offender, he will be allowed the benefit of the Act—if not, he will be denied it (H. A. H. L. vol. IV. p. 2).

Where a boy under fifteen years of age is led astray by those older than himself, and takes part in robbery with violence under their compulsion, the capital penalty is commuted to transportation for life: if the boy has been led astray more than once or twice, the plea is not to be entertained, unless there is very

strong evidence to support it. In the case of T'ang Pa-êrh 唐八兒, a boy was eventually allowed to commute the capital penalty for servitude in Kirin (H. A. H. L. vol. XIV. p. 84): but the commutation was only allowed after much difficulty, as it was by no means the first time that the lad had been led astray.

In *reckoning age*, it is the age calculated in accordance with common custom that the person in question will attain in the current year, not the actual number of months that have elapsed since his birth 至一切計歲定罪之案總以現任歲數爲斷 (H. A. H. L. vol. IV. p. 22). An offender aged seventy is entitled to the benefit of the Act, though he is only in his seventieth year, and has not yet seen his seventieth birthday. So again of a child aged seven years and one month, being in his eighth year, he cannot be considered seven years of age. And this, it is convenient to observe, is the general rule where any question of age comes in, as *e.g.*, in the case of murder of a child under ten (case of Fêng Chiu-êrh, 馮九兒, P. A. S. P. App. VII), rape of a girl

under twelve etc. Furthermore, in the case of youth, the age alone considered is the age at the time the offence was committed (not at the time of trial): in the case of an aged offender, age may be pleaded not only at, but after trial, if the sentence has not been carried out by the time the necessary age has been attained.

SOLE REPRESENTATIVE 承祀

Chinese law regarding the continuance of the succession of a family as infinitely important, in general allows an offender to escape the consequences of his offence — usually in the end by commuting the penalty to a fine — if he is the sole dependence of his family 親老留養. Not seldom no fine even is imposed, the offender escaping scatheless. The leniency extends to most classes of offences it would seem, even to cases of homicide. So in an instance of unintentional homicide, an offender may plead that he is an only son of a chaste widow, when his name may be placed on the deferred list. (H. A. H. L. vol. II. p. 22). The leniency

does not apparently strictly extend to cases of intentional homicide, and certainly does not to the gravest offences, such as treason; but as regards the former, it is open to question whether so strong a plea would not prevail in every instance. So if a sole representative kills his wife, the view taken is that the succession is more important than a better half's life **以妻命爲輕其祖宗嗣續爲重** (H. A. H. L. vol. II. p. 53).

An only son, the sole support of aged parents, though excused transportation, may not be excused straightway. So where a son killed his half-brother, and obtained reduction of the the capital penalty to transportation for life, on the ground that the homicide was in his mother's defence, and put in the further plea that he was a sole representative, in order to get entirely excused, the Emperor declined to allow him to go free at once. "He is somewhat 'forward,'" said His Majesty, "detain him for 'a year or so, until this quality is corrected.'"

Though excused punishment — transportation, hard labour, whatever it may be — a sole

representative must make good the amount of money etc., that he may have stolen, or the funeral expenses etc., the result of his offence.

It was formerly the rule that where the plea of a sole representative was advanced, the Governor had to investigate the circumstances in person. The relatives of the deceased were not required to give bonds assenting to the plea, but they were to be present when it was urged, and were to have an opportunity of protesting against its allowance. As these provincial investigations were shown to be extremely inconvenient, from the difficulty of collecting the witnesses, it was eventually determined, that where the scene of action was over eight hundred *li* from the provincial capital, the Intendants of Circuit should deal with the case, and that where the relatives were too old or too sick to appear, deputies might take their evidence at their abode (H. A. H. L. vol. II. p. 42) — *cf.* evidence *de bene esse*.

The existence of this plea accounts for some incongruities in the law, and the celebrated

American case, wherein a man who was convicted of murdering his father and mother, pleaded in extenuation that he was an orphan, has its parallel in the case of Wu Erh-tzü, 武二子, who successfully pleaded that he was an only son, and thereby entitled to commutation of the penalty of his offence, though he became so by killing his brother — the offence for which he was being tried (H. A. H. L. vol. II. p. 57).

Akin to the plea of sole representative is the plea of sole support of aged relatives 親老丁單.

WOMEN

Women are ordinarily allowed to commute transportation and penal servitude by fine — the former penalties being considered inapplicable to them. The leniency, under exceptional circumstances, has been disallowed; so in the case of M^{rs} Chu, 朱氏, who was declared to be such a virago, that neither her own, nor her deceased husband's family would have anything to do with her 爲女流中之敗類.

The virago was accordingly sent to work out her sentence of transportation on penal servitude in a Tartar garrison (H. A. H. L. vol. XLVIII. p. 80). According to the old law, women were not to be imprisoned, save in capital cases, and in cases of adultery — and the penalty was commutable by fine. This leniency has been altered (*v. Imprisonment*).

Bambooning, again, is a punishment which Chinese decency considers should not be inflicted upon women, and is ordinarily commuted for a fine. In the case, however, of those who have led licentious lives, and so forfeited their claims to consideration, the punishment will not be foregone (H. A. H. L. vol. XXVII. p. 54) — and so also of adultery. Squabbling wives and concubines are also considered suitable subjects for the bamboo. Where the punishment is inflicted, the woman may ordinarily retain both her inner garment and a single outer one: in the case of adultery and offences of a like disgraceful nature, however, the inner garment alone may be retained.

Even licentious women (though receiving,

as above stated, their quantum of the bamboo), are allowed to commute transportation for the cangue according to scale. Thus, twenty days cangue are considered the equivalent of one year's transportation, and ten days are added for each additional year of the latter punishment — *e.g.*, thirty days cangue = two year's transportation, forty days = three years' — until the limit of two months' cangue has been reached, which is considered as an equivalent of transportation for life.

SECTION III — PRIVILEGE AND PRIVILEGED CLASSES

PRIVILEGE AND PRIVILEGED CLASSES

Privilege is acknowledged before the law, and eight grounds therefor 八議 are recorded in the 周禮, and incorporated in the Code, *i. e.*, Imperial connection, length of service, worth of service, righteousness, ability, patriotic zeal, high rank, and privileged descent. In the wider, but not the technical sense, the treatment of aged offenders, of juveniles, of sole representatives,

and of women, is in China a question of privilege, and the objects themselves form into very real classes of privileged persons.

The effect of privilege is to cause considerable mitigation, and to confer certain favours — in either case, strictly legal effects duly incorporated in the system.

On a privileged person committing an offence, a representation thereof is straightway made to the Emperor, and it is not lawful to proceed further in the case, until His Majesty's commands have been received — and the privilege further extends to a privileged person's parents, grandparents, wife, son, or grandson. A traitor will not receive the benefit of this law.

The privileged classes herein dealt with are the Imperial connection, the nobility, officials and graduates.

In regard of the Imperial Family, there are included herein, all relatives of His Imperial Majesty who are descended from the same ancestors, all relations to the fourth degree of His Imperial Majesty's grandparents, all relations to the third degree of Her Majesty the Empress,

all relations to the second degree of the Heir Apparent.

A case in which a member of the Imperial Family is concerned is not to be dealt with through the ordinary channels, but such member will be dealt with differentially, and receive lenient treatment. The privilege is comprehensive. Thus in the case of Hèng Tè, 恒德, the offender became drunk and unruly in a magistrate's office: the Board decided that he ought to receive eighty blows, but as he was a member of the Imperial Family, and an hereditary official, the case was to be left for the Board of War to fix the penalty (H. A. H. L. Supp. vol. X. p. 67) — which latter was probably either mitigated to a fine or excused. This differential treatment often takes the form of stoppage of the maintenance allowance 罰俸 for a period — sometimes for ten year's or more: and this discipline extends to even the Princes of the Blood.

That important class, the Imperial eunuchs 太監, have also many privileges similar to the foregoing, but in less degree. They are members

of the Imperial Household, and therefore entitled to consideration. But they are regarded in ways with a somewhat subtle tenderness: they must not have any intercourse with the outer world 不准太監與外人交結, and the magistrates are responsible for their arrest if they are found outside Peking (H. A. H. L. vol. LI. p. 71). But though the Emperor Tao Kuang insisted upon this latter point, they do in fact occasionally visit the provinces. A head eunuch 首領太監 may be treated with greater severity.

The official class, especially officials in office, receive exceptional treatment. Any official sentenced to death may claim commutation to transportation, and when sentenced to transportation, unless the offence be in itself infamous, may claim exception from branding (H. A. H. L. vol. XI. p. 38). Any official sentenced to banishment *and* corporal punishment will be required to undergo the former, but will obtain remission of the latter without fine. Any official who has been degraded may also in such case commute the corporal punishment

— but here a special memorial must be submitted for the Imperial consideration in each instance. (H. A. H. L. vol. I. p. 4). Any official sentenced to banishment may obtain commutation to corporal punishment, and then may obtain remission of the latter by paying the full fine.

The person of an official in office is regarded with considerable special solicitude. Offences by such an official in his public capacity are, in practice, regarded with comparative leniency, though in law such cases are punishable with penalties of a varying number of strokes with the bamboo, commutable by forfeiture of salary for varying periods — degradation being accorded in the more serious cases. Offences by an official in office of a private character are visited with somewhat greater rigour than the above — forfeiture of salary and degradation being the correctives as before. It is to be noted that an official must hold office and be on full pay, for offences committed by or against him to be considered as offences by or against officers of the Government (H. A. H. L. vol.

LII. p. 46). But although this is so, if an official retires in a regular manner from office, his other privileges still continue, and his person is still sacred so far as those previously under his jurisdiction are concerned. So in the case of Chang Wên-hsiu 長文秀, sentenced to decapitation for causing the death of a retired police officer, the Board disapproving the original provincial sentence of strangulation for killing in an ordinary affray (P. A. S. P. vol. XIX. p. 33). Officials are considered to have retired in a regular manner, when transferred from one post to another, or when they have obtained leave to retire, by reason of infirmity, age, or the death of relatives. Persons who have acquired honorary distinctions, on account of the elevation of their children or descendants have, in these particulars, the *status* of officials who have retired regularly.

Offences committed by officials prior to their elevation, but not tried until subsequently thereto may be redeemed by fine according to scale. An official degraded for an offence of a private nature is in the position of an ordinary individual.

The nobility and officials (in or out of office) of above the 5th grade enjoy certain other amenities. In either case, if the offender be in prison, his relatives have a right to see him, and if he be sentenced to transportation, they may accompany him on his way. Again, where such an offender dies, whether in gaol, or on his way to his place of punishment, the evidence of his relatives is to be included in the circumstances of the death.

Members of the Tartar Banner force are to receive corporal punishment, but with the whip, and not with the bamboo. As for transportation, they may commute the same for the cangue, according to scale.

Graduates (the *literati* class), are also highly favoured, and it is immaterial whether the degree be a bought one, or obtained in the ordinary manner. Graduates are allowed to commute ordinary offences by paying a fine, but not so where the offence be rape or robbery, or offences of a disgraceful character (H. A. H. L. vol. XVI. p. 77). A graduate, like an official, may, it would seem, if sentenced to death, claim

commutation to transportation; and when sentenced to transportation, may obtain commutation to corporal punishment — while remission of the latter may be procured on payment of a fine (as in the case of an official). Further, when sentenced to transportation, unless the offence be in itself infamous, a graduate may claim exemption from branding (H. A. H. L. vol. XI. p. 38).

Priests (*v. Religion*) do not receive any consideration — on the contrary, they are exceptionally severely treated.

SECTION IV — ACTS OF GRACE

ACTS OF GRACE

Whenever an Emperor celebrates his jubilee, or his marriage, or the attainment of his seventieth or eightieth year, or, in short, whenever an excuse can be found, he publishes an Act of Grace.

Acts of Grace are either ordinary or extraordinary, and the effect differs in either

case. An extraordinary Act of Grace 大赦 extends to all save the very worst offenders, and its effect is not only to cause the remission of the punishment, but also to cause the entire cancellation of the offence — thus a thief pardoned under such an Act is dealt with as for a first offence if he offend again. An ordinary Act of Grace 常赦 and General Gaol Delivery 清理度獄恩旨 extends to a more limited class of offences, and only remits or commutes the punishment: the stigma remains, and the relapsed offender has his former offence considered in his sentence (H. A. H. L. vol. XVII. p. 42) — the penalty due to his present offence being increased a degree (H. A. H. L. 面 II).

The effect of an Act of Grace is, however, a difficult subject, and it is well to speak under correction, for not only does it appear that high official after high official has failed to master the mystery, but the rulings of the Board, in dealing, not only with cases of relapsed offenders, but with features affecting these enactments generally, do not seem to have been always consistent one with another.

The Board, however, admits that Acts of Grace and their interpretation proceed on no fixed principle — they are extraordinary measures administered to suit the circumstances of the occasion 隨時變通並非一成不易 (H. A. H. L. vol. XVII. p. 59). As one judge declares, the subject is full of peculiarity.

It may, at all events, be stated with tolerable accuracy that, to give a striking example, an ordinary offender considered worthy of death, and so sentenced, may, under an extraordinary Act of Grace, escape without a stigma and at once, while, under ordinary Acts of Grace, such an offender may reasonably hope that his punishment will be reduced degree after degree, until he finds himself a free man — though with the stigma of his offence upon him.

Generally speaking, any Act of Grace will extend to offenders at any period, before trial, on trial, after conviction, on their way to punishment (*c. g.* transportation), on and after arrival there. When the offender is in hiding at the time, he cannot plead the Act, though he can if no charge has been laid,

and his criminality is subsequently discovered (H. A. H. L. 面 II). Special provision is also sometimes made that offenders of seventy years of age or over, or who have behaved well for three years since conviction, shall, unless their offence come within the Ten Felonies 十惡, receive a free pardon.

It follows also, naturally, that where the principal, sentenced capitally, receives a pardon, the accessories, who have been sentenced to penal servitude, shall also be released.

Where capital offences have been commuted to transportation for life, an Act of Grace allowing redemption of the latter penalty by fine only applies to cases of long standing, and the fine is to be the equivalent of the penalty to which the offender was originally sentenced.

The Ten Felonies are generally excepted from the benefit of an Act of Grace, and, in the early days of the dynasty at least, offences against martial law and the harbouring of deserters also. The various Acts, however, differ in the offences covered by them. Thus, in that

published on the accession of Chia Ch'ing, in addition to the offences above mentioned, forty-seven capital offences were, in effect, excepted from the operation of the Act, although but forty-three were specified therein. As, therefore, the offences specified would not complete the catalogue of crime, it was further laid down in the Act, that unspecified offences of similar nature should be dealt with under one or other of the categories specified in the list, and were to be considered as if originally embraced within the meaning of such similar and specified categories. The principle followed in this Act is evident enough; namely, that ordinary offences, for which no special ground for severity existed, should be excused; that the more serious offences, which it would be dangerous to excuse, should be punished; and that the spirit of the Act might be followed, and not its mere letter, provision was made that unenumerated offences might be dealt with on their merits.

The following lists show what offences have been excused under Acts of Grace, either on

the instant, or after the application of the bamboo, and what offences have been excepted from their operation.

Offences excused. —

Killing in an affray.

Killing in a planned affray — taking a principal part therein.

Killing a bystander by accident in an affray.

Wounding severely in a planned affray wherein homicide occurs.

Killing in course of sport.

Killing deliberately: being an accessory actually taking part therein: provided the killing was not influenced by lucre or malice, and did not occur in the course of rape or robbery.

Killing deliberately an immediate relation, if for cause, and not for cruelty.

Killing an immediate relation: provided it be done in ignorance of any existing relationship, and provided the case is capable of being treated as between ordinary persons.

Killing a wife deliberately, if for cause and not for cruelty.

Beating and killing a wife.

Killing a wife and her paramour, and then fleeing.

Liability of a wife for the killing of her husband by her paramour — she being ignorant thereof.

Killing an elder sister's husband by striking him.

Beating and killing a junior relation by marriage — the junior being within the degrees of mourning.

Planning the deliberate killing of a junior and causing his death, if for cause and not for cruelty.

Beating and killing the wife of a distant junior relation.

Killing deliberately one's hired servant.

Killing the servant of a junior relation by striking him.

Killing the slave of another — the slayer being a respectable person.

Worrying a person to death.

Killing an offender who has been captured by the slayer and has not resisted arrest.

Attempting rape, and thereby causing the victim to commit suicide.

Oppressing the people, and thereby causing death — by civil and military officers, presuming on their position.

Bringing a false accusation, and thereby causing the death of the accused.

Smuggling in bodies of ten or more and resisting arrest: provided the smugglers be unarmed and do no injury.

Robbery with violence, wherein wounds are inflicted, but homicide does not occur.

Theft to a capital amount: provided there be no aggravating circumstances.

Theft on third conviction for stealing an amount exceeding Tls. 50.

The embezzlement by unsalaried persons of Government funds to the amount of Tls. 120.

Obtaining Tls. 10 or more by means of a sham warrant — taking a principal part therein.

Inveigling away young persons not being parties thereto.

Opening a coffin to see that the corpse therein has not been injured — taking a principal part in the offence.

The opening of gambling houses by bannermen for ten days or more, on third conviction.

The resisting his arrest by a thief, who has used cutting instruments, but has not done fatal injury.

The escaping from their place of punishment and subsequent commission of transportable offences by convicts.

Taking bribes from convicts to assist them to escape; where the amount is within Tls. 120.

Offences excused after bambooning. — It is not unusual to provide that, preliminary to release under the Act, certain classes of offenders shall undergo a slight treatment of the bamboo. Thus, it has been provided that women who plan the death of their paramours, repenting of their sin and desiring to break it off, are, preliminary to release, to be treated with twenty blows of the heavy bamboo: and similarly with slaves who beat, and thereby cause the death of, respectable persons; and so with those of tender years who beat, and thereby cause the death of, their cousins within the degrees of mourning; and so with offenders who with excuse resist arrest, and kill the person seizing them. In a well-known Act of Grace, dated the twelfth day of the ninth month of the twenty-fifth year of Chia Ch'ing, like provision was made for the following offences:

Striking a senior, and killing him thereby.

Offences of such a class as that committed by a son or grandson,

who, by his immoral practices, causes his parents to commit suicide, and is not sentenced to immediate death.

Responsibility attaching to a naughty wife whose paramour kills her husband — she being neither privy to the matter, nor hushing it up.

The terrorising, beating, and killing of the people by civil and military officials.

Abuse of authority, and thereby causing a person to commit suicide.

Bringing a false accusation of theft, and causing loss of life thereby.

Bringing a false accusation, and thereby causing the death of the accused.

Resisting arrest and killing the would-be captors, under mitigating circumstances.

The resisting his arrest by a dissolute person, who also wounds his would-be captors.

Piracy on river or land, there being mitigating circumstances, and the pirates delivering themselves up to justice of their own motion, or knowing that warrants are out for their arrest.

Robbery and murder by accomplices who have taken part in the violence offered.

Robbery, using sharp instruments at the time.

Robbery of the first class, or theft by servants or others to the amount of Tls. 500 or over.

Theft, using sharp instruments at the time, and with them resisting arrest, and wounding the would-be captors.

Being an accomplice in an unsuccessful swindling case.

Attempted rape, aggravated by wounding the victim with sharp instruments.

Being an accomplice of some illegal organisation, such as the Red Whiskered sect, and thereby becoming liable to capital punishment.

Destruction of another's grave, opening the coffin, and exposing the corpse, but not doing the latter any injury.

Offences excepted. — Many offences, both capital and transportable, have been excepted from the operation of Acts of Grace.

Plotting rebellion.

Responsibility of relatives for the actual rebellion of their kindred.

Responsibility of a convict for the treason of a relation.

Deserting from the army in time of war, and committing offences.

Conduct affecting military operations, or acting as a spy on the frontier.

Keeping back military intelligence, if injury be done thereby.

The losing of their posts by frontier commanders.

Entering into relations with foreigners, and cheating them.

Striking an official, by a bannerman or *employé* — where the offence be treated as transportable.

Insulting and injuring a superior officer, by a bannerman or *employé* — where the offence be treated as transportable.

Actual embezzlement of Government funds by salaried officials, but not by a private individual sentenced under the statute hereon.

Embezzlement of Government funds by a salaried official to the amount of Tls. 80 or more.

Voluntarily joining an illegal and detestable sect, and committing an offence punishable with military servitude.

Responsibility of relations in the case of the above offence.

Affiliation in an illegal society or brotherhood.

The bringing of false capital charges by the police.

Forging official documents charging individuals with crimes.

Designed aggravation or mitigation of indictments by magistrate's clerks.

Outrageously entering a public Court, and insulting a magistrate, or mobbing an official — where the offence is aggravated by violence or special gravity.

Outrageously inciting suitors to contempt of Court — but not if guilty in one instance only, though tried under the statute hereon.

Ruffianism.

Propagating false reports to the disturbance of the public peace.

Inciting a breach of the law, leading to an offender being sentenced to death, or otherwise causing loss of life.

Continually causing turmoil and rowdy disturbances — in the case of those who, persisting in their evil ways, are a source of danger to the public weal, and cause loss of life.

Taking advantage of the position of servant to an official, and causing disturbance in the postal service.

Collecting in force to rescue prisoners, if the police be wounded.

Outrageously setting fire, for lucre, to public or private buildings, treasuries, or granaries.

Outrageously setting fire to any building, whether for revenge or lucre, and whether the fire be put out at once or spread to adjacent buildings, if the offence be treated as transportable, and though robbery has not been committed.

Poisoning.

Parricide.

Killing three of a family.

Causing the death of anyone with a view to personal gain, or killing generally.

Killing with intent.

Killing a bystander by accident, intending to kill someone else.

Planning murder — the principal thereto: and the accessory also, if interested therein.

The beating and killing of senior relations by an untuly junior.
Neglecting the support of parents, and causing their death or suicide thereby.

Complicity in robbery or immorality, and causing a parent's death or suicide thereby.

Beating to death or killing with a sharp instrument an immediate senior relation, though on the spur of the moment, and consequent on the misbehaviour of the said relation (*recommended by the Board for exemption, but by Imperial Decree added to the exceptions*).

Worrying to death a near and senior relation.

Without murderous intent wounding and causing the death of an elder brother (*recommended by the Board for exemption, but by Imperial Decree added to the exceptions*).

The killing, at his mother's command, of an elder brother of a former wife (who has since remarried) of the slayer's late father (*id.*).

Planning the deliberate killing of her husband by an adulterous wife.

Agreement of a wife to deliberately kill her husband at the instigation of her paramour.

Concealment by a guilty wife of the deliberate killing of her husband by her paramour.

Intentionally killing a wife, without good cause and out of cruelty.

Intentionally killing a younger brother or cousin, without good cause and out of cruelty.

Deliberately planning the death of a junior — the case being treated as intentional killing without good cause and out of cruelty.

Leading a daughter-in-law into impropriety, and thereby causing her to commit suicide.

The deliberate killing by a slave of his lord.

Responsibility of a relation of a slave or hired servant for the premeditated killing by the latter of the master.

Responsibility of a convict for deliberate killing committed by a relation, or for premeditated killing committed by a relation, whereby three of the aforesaid convict's near relations lose their lives.

Deliberate killing, consequent on immorality or robbery, by an accessory taking actual part therein.

Attempting to rape a widow, and thereby causing her to commit suicide.

Abduction or forcible marriage of a widow or woman living by herself, thereby causing such widow or sole woman to commit suicide: provided the offence be treated as transportable.

Raping a girl under twelve years of age, and thereby causing her death.

Illegal employment of torture, causing death thereby.

Bringing a false accusation against persons under torture, and thereby causing the death of one or more.

Beating and killing prisoners by anyone in prison.

Killing a person resisting sale.

Witchcraft, with fatal results thereby.

Resisting arrest, fatal results following thereon, and the circumstances being grave.

Theft and resisting arrest, fatal results following thereon — taking a principal part therein.

Robbery with violence, whether originally premeditated or not.

Robbery causing the death of the person robbed — taking a principal part therein.

Theft to a considerable extent, coupled with violent resistance to arrest.

Persistent theft.

Raping the wife of a senior relation.

Raping a relative of or within the fourth degree.

Attempting to rape a daughter-in-law.

Defiling a sister-in-law.

Defiling an aunt within the degrees of mourning.

Defiling half-sisters by the same mother.

The defiling by a slave of his master's concubine.

Seduction and sale of the relations of his lord by a slave or a hired servant.

Kidnapping and rape of respectable children — taking a principal part therein.

Kidnapping respectable women, and marrying them by force.

Using spells or drugs to kidnap children.

Pretending to act as a broker, buying women, and living on the proceeds of their forced prostitution — if of long continuance, and treated as a case deserving military servitude.

Reduction to impotency by immoral practices — taking a principal part therein.

Beating and wounding a near and senior relation.

The wounding with sharp instruments of a near and senior relation by an unruly junior.

The beating of her husband or master by a wife or concubine respectively.

The beating of her master's wife by a concubine.

The assaulting by slaves of their lords.

Salt smuggling in bands of ten or more, where the smugglers are armed and resist arrest.

The bringing of a false accusation of a junior against a senior, or by slaves and hired men against their lords.

The bringing of a false accusation by a servant against his master.

Conviction for an offence at the request of a parent or grand-parent, the latter being unwilling to receive back their offending relation.

Hushing up for money the deliberate killing of a parent or grandparent.

In conclusion of this subject, it is desirable to mention certain points of general and special application in regard of branding and the effect thereon of Acts of Grace.

The general rule, as regards capital penalties, is that an offender obtaining commutation thereof under Act of Grace is to be branded (H. A. H. L. vol. XVII. p. 53). Sundry points arise, however, as well in respect of other penalties, as in respect of capital penalties, on the question whether or not an offender shall be branded.

And first it is of great importance in this connection to determine the question of time. When was the offence committed — before or after the issue of an Act of Grace? When was the case tried? When was the offence discovered? So of larceny; if theft is committed before the issue of an Act of Grace, though the case did not come before the Court until after such issue, the offender is to be branded: if the thief be an old offender, but the case was tried before the issue of an Act of Grace,

the former brands are to be obliterated only if the offence be specified in the Act as excused — otherwise the former brands are to be renewed. If, after the issue of an Act of Grace, an offender sentenced to a life penalty escapes, and incurs thereby the sentence of three year's transportation, the brands are to be obliterated (and the offence of escaping excused): but if such offender commit the offence of escape before the issue of an Act of Grace, though excused his escape, his brand is to be renewed. Again, if such offender commit one act of robbery before, and a second after, the issue of an Act of Grace, both cases coming to light at the same time, they are both to be taken into consideration, and, in the event of subsequent conviction, both cases are to be counted as previous offences — and the offender will be so branded. Moreover, if such an offender has taken upon himself to obliterate his branding, *or* has resisted arrest, and has thereby incurred the aggravated penalty of transportation for a term or for life, the former brand is to be renewed.

It seems hard in some of these instances to discover any sequence of reasoning, but what has been already stated must be well borne in mind — Acts of Grace and their interpretation proceed on no fixed system, and are the servants of circumstances.

CHAPTER IV

THE POSITION AND LIABILITIES OF
SUNDRY OFFICIALS EMPLOYED
IN THE ADMINISTRATION
OF JUSTICE

MAGISTRATES' DUTIES ETC. — POLICE ETC. — TI PAOS —
PRIVATE SALT WATCHERS

MAGISTRATES' DUTIES — OFFICIAL CARELESSNESS

Magistrates are under liability to receive and act on informations or complaints regularly presented or made, subject to penalties varying with the nature of the charge, and the effects, if any, of their neglect. So, if an information touching high treason be regularly presented, and the magistrate does not take the proper measures in regard therewith, if riotous results follow, the magistrate will be decapitated, and

if no results follow, he will receive 100 blows and transportation for three years. So, again, if a magistrate refuses to receive a regularly preferred charge touching parricide, he becomes liable to 100 blows, and for such neglect in the case of ordinary homicide or robbery, a liability to eighty blows is incurred.

If a magistrate allows an offender to escape the penalty due his offence, or if he convict him of a graver offence than that of which he is really guilty, and he does so wittingly, he is liable to the full penalty which, in the one case, he ought to have exacted, or which, in the other, he has wrongfully imposed. If the magistrate committed his error in ignorance, the sentence, in either instance, is commuted five degrees; while, in the former of the two instances given, if he can regain the criminal, an additional commutation of one degree is allowed (H. A. H. L. vol. LX. p. 4). Further, in regard of an error committed in ignorance, where the magistrate has subsequently discovered and rectified the same to the best of his ability, he will be pardoned, although

the sentence has been executed, in the case of too lenient a sentence, and will receive a mitigation of three degrees in such case, in respect of too grave a sentence.

Carelessness which in England would subject an official to a civil action for damages, in China is considered as a criminal offence. A well-known instance is that wherein a man was left in prison for years, because the clerks omitted his name in copying the instructions regarding him (H. A. H. L. vol. LIX. p. 7). The remedy is however somewhat dangerous, and it is on points such as this, that the Chinese system contrasts disadvantageously with our own: *cf.* the position of a criminal in England before the invention of the Habeas Corpus Writ.

Magistrates are also naturally liable for the imprisonment of persons not implicated in an offence, that is, if the false imprisonment be with design, and out of private feeling: and so also, but in less degree, where persons summoned to give evidence are so imprisoned — though the imprisonment be inadvertent.

A magistrate is, furthermore, responsible for the

safe keeping of imprisoned offenders, their wearing fetters and handcuffs etc., and their general treatment — be it milder, or more severe, than the law prescribes. The penalties vary with the particular nature of the offence itself, and the offence of the offender so treated — ranging from thirty blows upwards.

A magistrate who warns a prisoner to escape will be held to have a warrant for his arrest (H. A. H. L. Supp. vol. XIV. p. 51).

Definition. An official in charge of a criminal is styled 解官, and pending conveyance to a magistrate 於押解人犯, incurs special liabilities thereby.

POLICE ETC. — TIPAOS — PRIVATE SALT WATCHERS

Police etc. — The system provides that constables 捕役 shall be held responsible for the detection and arrest 監獲 of criminals, and shall be periodically beaten if they fail to produce offenders.

Where a magistrate has issued a warrant for the arrest of a certain offender or offenders, a definite period — under the old law, in general

thirty days, but, in the case of larceny varying — is prescribed, within which the offender or offenders must be produced. Where the offenders are several, the production of one-half of them, or of a lesser number, if the most guilty be included therein, will be held sufficient. If the period be exceeded, the police-officer will incur a penalty one degree less heavy than that due the offender, or the most guilty of the offenders, if there be more than one. It may be herein added that an officer, not being a regular police-officer, but detached from his ordinary duties to perform police functions, will, in the case of these offences, receive a penalty less by one degree than that attaching to a regular police officer.

This system of responsibility for detection of crime and arrest leads ever and again to constables putting pressure on other offenders, or, it may be, innocent persons, to confess to offences of which they are innocent. Where, on trial, this is discovered to be the case, if the person tortured by the constable confessed himself *e. g.* a thief, and be really innocent of all offence, the constable will be sentenced to military servitude; if the said

person be a thief, though innocent of the offence in question, the constable will be sentenced to three years' transportation (H. A. H. L. vol. XLVIII. p. 28).

If a constable arrests the wrong person, and thereby causes the latter's death, he will be held capitally liable; and even where there appears to be no reason to doubt that he acted honestly, and the person dies of disease caught in prison, he will be sentenced to transportation for life (H. A. H. L. vol. XLVIII. p. 29).

It is bad for a constable to let an offender go 已屬疎忽, but worse for him to equivocate about it 捏報被搶, for thereby he will entail upon himself the penalty for slander (H. A. H. L. Supp. vol. XIV. p. 51).

It will go equally hard with a constable who allows the escape of an offender he has in custody, or who gives the word to one for whom he holds a warrant (*id.*).

A constable who takes a bribe 受賄 to let an offender go, will incur the penalty due the latter. This refers to *solitary* instances of neglect of duty; if the constable received bribes regularly

(being, as it were, in the pay of offenders), he will be dealt with under another clause — “constables who maintain and harbour thieves, “etc.” — and sent to military servitude in the swamps (*id.*).

In regard of a constable’s right of offence or defence his powers are strictly limited. A constable duly armed with a warrant and in self-defence is, however, practically justified in killing an offender who resists him, provided the killing be unintentional and in the act of arrest. A sentence of 100 blows will, however, be imposed.

It is decapitation without appeal for an offender to kill a constable armed with a warrant for his arrest, whether or not the killing be intentional; but the constable must either have a warrant, or be authorised to arrest the offender. If the person so killing be not the actual offender, but merely involved in the case, the capital sentence is subject to revision (H. A. H. L. vol. LV. p. 13).

Ordinarily the above penalty is increased two degrees, if the offender has resisted arrest and hurt an officer (H. A. H. L. vol. LV. p. 15).

It is strangulation subject to revision if the injury done the person arresting an offender amounts to breaking a bone (H. A. H. L. vol. LV. p. 26, *v.* also *Excusable Homicide*).

Private detectives 白役 have, apparently, to be selected, registered, and provided with a ticket, much in the same manner as private salt watchers (*infra*); and when these conditions are complied with, the protection accorded an ordinary constable is conferred.

Tipaos.—Tipaos and ward elders have authority to arrest offenders and hand them over to the constituted authorities for trial and punishment; but they cannot claim the benefit of the clauses under which a constable, armed with a warrant and in self-defence, is justified in killing an offender who resists him.

Private Salt Watchers. — Private Salt Watchers are protected in the same way as constables, if approved by the local authorities under whose jurisdiction they are placed, and registered at the Judiciary Board. They must be carefully selected, registered, and provided with a waist ticket by the magistrate, or they will be treated as if they

had no *status* whatever (H. A. H. L. vol. X. pp. 10, 11, 12). Though, however, they may have no proper authority to arrest a smuggler, yet, if they shoot a mere thief, some consideration will, it appears, be shown (*v.* case of Chiang Li 蔣禮, H. A. H. L. vol. X. p. 20). As regards the carrying of firearms, they are allowed to do so at sundry and special times, subject to the proviso that they are not to use them, unless resisted by large bodies of *armed* smugglers, and with restriction to arms specially issued to them and registered (H. A. H. L. vol. X. p. 29 — *v.* case of Chiang Li *supra*).

PART II



RELATIONSHIP

CHAPTER V

RELATIONSHIP

PREFATORY

The subject of relationship, dealt with but shortly herein, offers one of the widest and most interesting fields of research in Chinese Law: China is a country of relationships, whether natural or artificial, and not a few anomalies are traceable to this source. The modes of formation and of dissolution of relationships are sufficiently curious, but the effects of ties are stranger still. Of these points in their order, premising that the subject is not easy of concentration, and will, independently of this chapter, be dealt with as occasion arises under the head of various offences and considerations.

SECTION I — NATURAL RELATIONSHIPS — THE RELATIONS
OF A CHINESE — GENERAL INFLUENCE*NATURAL RELATIONSHIPS*

THE RELATIONS OF A CHINESE

A Chinese has many relations — far more than the average Englishman. So of mothers, a Chinese has not one only but several. Firstly, there is his own mother — not the mother who bore him, but his father's chief wife: then, there are his other mothers — his father's other wives: then, there is the mother who bore him: then, the mother who has brought him up: then, the stepmother, if the wife dies and his father supplies her place: then, the wife of the relative to whom he has been assigned as heir: then, the mother-in-law: and so forth. If, then, the consideration merely of mothers is somewhat perplexing, the difficulty of comprehending the more distant relationships will be seen.

Mourning is worn for four degrees of relations; the kind of mourning, and time for which it is worn, varying with the relationship; and, in law,

relationships more remote in degree than the above are not, in general, taken into consideration. Relations of the first degree include parents and grand-parents, styled the 'nearer relations' in this degree; and also other relationships of the first degree more remote than the nearer relations. Relationship of the first degree is thus of two grades, but inasmuch as the latter grade mentioned is in reality another degree of relationship, it is so considered as occasion arises in this book, and styled the second degree of relationship. Relationships of the first two degrees (drawing the above distinction) comprise twenty-four in number, of the third fourteen in number, of the fourth twenty-one, and of the fifth forty-two.

This brief sketch indicates the complexity of the subject. In dealing with uncles, cousins, and more distant relationships tables are essential, and with the tables, close attention to see where and how the relationship comes in. But the difficulty is one to be grappled with, for on the relation in which one person stands to another depends the nature of the action.

GENERAL INFLUENCE OF THE CONSIDERATION

“But it is a case in which relationship is “concerned,” is a common phrase in reports of the Chinese Courts, and the judges, instead of dismissing an offender with summary chastisement, will accordingly sentence him to, very possibly, immediate decapitation. So, to kill a person may, by virtue of relationship, be, in effect, no offence whatever; while to hit a person accidentally may, under the same consideration, be the most heinous of offences. An injury done by a senior to a junior relation is, indeed, generally punished in some measure — but the penalty bears no relation to the injury. The influence is one which makes itself felt throughout all the ramifications of relationship: its presence is naturally most manifest in the relation of parent and child or of husband and wife, but it is also most plainly to be discerned in the near relationships other than these. Thus, if an uncle or aunt beat their nephews or nieces to death, the penalty is but one hundred blows and three years’ transportation: if they kill them intentionally, it is only one hundred blows and

transportation for life to 2,000 *li* distance: and, in respect of the latter instance, if the act is done with the intention of bringing other people into trouble, they are still merely punished with military transportation. If a case be aggravated by the unnatural relations being influenced by designs on the virtue or property of the nephew or niece murdered, or by an old hatred of them, the penalty will still only be strangulation subject to revision: and though it is true a decree of Ch'ien Lung provides that, where the case is a particularly bad one, the aforesaid senior relations may be sentenced to capital punishment, even where the above-mentioned special elements of aggravation are absent, yet it is also laid down in the decree that the sentence shall not be carried out. If the junior has been guilty of grave offences rendering him capitally liable, it is *a fortiori* a case in which his incensed seniors may put him to death — still subject, however, to a penalty, though trifling: and so also with a junior who is a bad character and is bringing discredit on the family.

The privilege of cutting short a junior's existence

is not, however, extended to the more distant relatives — not even to the head of the clan, though in minor matters his power over a junior would not be questioned. Still, however, allowances will be made, and his position taken into consideration in the sentence.

On the other hand, as regards his juniors, a senior is sacred, and though acting under orders or assisting his seniors to correct him, the juniors will be sentenced capitally if they kill him, and the utmost grace shown them will be that execution may be deferred and subsequently commuted. Nor must a junior, though in a painful position, endeavour to extricate himself therefrom by forcible remonstrance with his aggressive senior — even if he does the latter but very slight injury thereby. So in the case of Ch'ang Ting-yü 長鼎玉, the offender therein, objecting to having his head knocked against a wall by his uncle, made a dig at the latter with a knife he held in his hand. The uncle was slightly wounded, but speedily made a complete recovery. The offending nephew was sentenced to immediate execution, and, as a measure of grace only, the

Board allowed commutation to execution subject to consideration at the Autumn Assize. It is death for a person to draw a knife on his senior in the first degree, whether he let blood or not; nor will the plea that a junior killed a senior in defence of his father be of great weight — the sentence being transportation.

It is in general an offence for a junior to bring a charge against his senior blood relations, even although the charge be true, and the penalty incurred thereby will be one hundred blows and transportation for a term (H. A. H. L. vol. XLVIII. p. 86). If the charge be only partially true or wholly false, the junior will incur strangulation. But the gravity of the offence varies much with the nature of the charge, and especially with the nearness of the relationship. In the case cited, the senior relations included were the parents, paternal grandparents, a husband, a husband's parents or grandparents. Charges brought against more distant relations are far more leniently treated: so a charge brought by a son against maternal grandparents, if true, involves but 100 blows: and a charge against an elder relation in the second

degree, if true, involves ninety blows only. Certain heinous offences are excepted from the operation of this law, *e. g.*, treason, rebellion, compounding of serious offences against the State etc. etc.

However remote the relationship of the parties 疎遠親屬, even though it be so distant that on death no mourning would be worn by the one for the other 疎遠無服親族, it is invariably considered in cases of strife; and where the person injured is a senior the punishment of the offender is to be increased one degree, so far that it does not bring the penalty up to capital punishment. But there must be a palpable relationship of some kind, and mere connections 親誼, however intimate 素有瓜葛之家, are not considered relations within the meaning of the provision hereon.

Offences against relations are the more serious the nearer the relationship; but there is one offence, theft from a relation, in which the reverse is the case — thus, theft from a father is not dealt with so seriously as theft from a more distant relation or an outsider. Yet here also the penalties for theft by a senior from a

junior are less severe than for theft by a junior from a senior (see later — *Larceny*).

Where the person who commits an offence against another was ignorant of the existence of any relationship, he will not incur the aggravated penalty: on the other hand, a person ignorant of the existence of any relationship may subsequently claim any benefit it may confer — *v.* case of P'êng Chih-ming 彭之名 (P. A. S. P. vol. XV. p. 8).

There is also another subject into which the question of relationship enters, of which it is desirable to make note here — *i. e.* the liability of relations for offences committed by one of their body. The liability may obviously arise in several ways, but is in general distinguished by a characteristic peculiarity — its origin, not from active instigation, but from the passive condition of relationship. A senior relation is usually liable for a junior's offence (subject of course to such considerations as age, etc.), though the penalty will generally not be heavy. A senior is under no obligation to condone an offence which has not yet come to light, as is the case with a junior

(*infra*) — and if he does so, that is his affair. The question as to a senior's knowledge of the commission of an offence is immaterial. Thus a son commits an offence, and whether or not the father has knowledge of it, he will be liable. So a father was sentenced to one hundred blows, because his son (unknown to the parent) had abducted a young woman (H. A. H. L. vol. IX. p. 7). A junior relation is also usually liable for his senior's offence, and more heavily so than a senior is for a junior. A junior is also in a more difficult position, and his liability may be of a double nature — he has not the freedom of a senior, and so his duty is in general to condone the offence, if it has not yet come to light; and if it has, he may or may not be liable, according as such questions as the nature of the offence, of sole representative, of age, etc., etc., are of weight. Treason is the only offence a relative has no right to condone, and even here a junior must be able to prove the charge, or he must pay the penalty: and juniors and wives must suffer punishment for the actual treason of a senior or a husband.

In certain cases the relatives of offenders are

declared incapable of attending the examinations; but this is extra-legal rigour — a measure adopted to meet the exigencies of a particular case
 係隨時懲辦原無成例 (H. A. H. L. vol. XI. p. 36).

SECTION II — PARENT AND CHILD

PARENT AND CHILD

Parents, grandparents, and those who stand *in loco parentis*, are, as respects their children, in the same position; and it is the same offence to be unfilial to the person who stands *in loco parentis*, as it is to be so to the true parents (H. A. H. L. Supp. vol. XI. p. 67).

Parents etc., have the power of sending their children to Botany Bay; and the power seems to be exercised on very slight grounds — as in the case of Shên Ching-ch'üan 沈經全, who had borrowed money and spent it (H. A. H. L. Supp. vol. I. p. 13); or in the case of the brothers Yang 楊, who had disobeyed their father on one

occasion only (H. A. H. L. Supp. vol. I. p. 14).

If parents bring their children before the Courts, the magistrates are instructed to sentence them to transportation on the plantations, without going further into the case. The parents are the best judges, and treating their children leniently may lead to serious results. The only exception to the rule is where a widow brings up her husband's son by another wife, and, in this case, the circumstances are to be inquired into (v. case of Sun Mou 孫謀 (P. A. S. P. vol. XXVIII. p. 10).

If their children are disobedient, parents have the power of handing them over to the Court 呈送, with the request that they may be transported to the plantations. Thus, in the case of Ch'eng Pang-kuei 程邦桂, a man and his wife were transported for life for disobedience to their parents, and answering back when rebuked (H. A. H. L. vol. XLIX. p. 51). Running away from home for two years, has also been considered sufficient ground for such treatment (H. A. H. L. vol. XLIX. p. 54); and likewise the pawning of a mother's clothes to pay gambling debts (H.

A. H. L. vol. XLIX. p. 55). But the Reports are, in fact, full of such cases.

Under ordinary circumstances, some considerable mitigation is allowed a son so sentenced. Thus he is allowed to benefit under an Act of Grace, and to commute his term for one month's cangue. Again, if the parents die during the son's term of punishment, he will be allowed to return and bury them — provided the offence be but a solitary instance of disobedience 偶爾觸犯, and the son has behaved himself properly in confinement. If the son be a ne'er-do-well 怙終不悛, and has been brought before the authorities on another or other occasions, no mitigation of his sentence will be allowed. Thus, there is a case where a son was transported for leading a fast life and being disobedient. Released subsequently by Proclamation, he ventured to get drunk, and was for this again sent to transportation for life, and refused the benefit of any future Act of Grace.

As regards personal correction, though parents have ample powers, their actions must be reasonable. It is supposed to be improper to correct a disobedient

son unreasonably. Thus if a father beats his disobedient son to death, he will be liable therefor to one hundred blows: or if he kills his son without just cause, he will be liable to sixty blows and one year's transportation. But if the killing be consequent on the son's abusing or striking his justly angry parents, no notice will be taken of the affair (H. A. H. L. vol. XLIV. p. 1). The plea of provocation is made full use of. So a grandfather, who buried his son alive, was let off because the boy abused him (*id.*): and it is quite permissible for a father to strangle his daughter, if she misbehaves (H. A. H. L. vol. XLIV. p. 2). A father who strangled his son for stealing watermelons now and then did not, however, escape so easily — he received one hundred blows (H. A. H. L. vol. XLIV. p. 4).

Not only may the parent himself stiffly correct an abusive and disobedient son, but another person may do so at the parent's request, and if the deputy kills the son, he will only be liable to receive ninety blows — as in the case of Chang I-kao 張益高, who, at the request of the father, beat the son to death, for objecting

to being given up to justice and using abusive language (H. A. H. L. Supp. vol. XII. p. 3).

It has been stated (*supra*) that a parent who kills a child without just cause will receive some slight punishment; *a fortiori* in the case of a parent who kills a child merely from motives of temper or cruelty — yet, such is the tie of relationship, that here also the penalty is out of all proportion to the offence. So in the very bad case of Mrs Wang *née* Li 王李氏, wherein a mother murdered her son, because he interfered with her improper tastes. Admittedly the woman was undeserving of consideration; but her son's feelings must be respected, though he was in the spirit world; and as it was clear that he would not wish his mother to be hanged, she was merely given to the Tartars as a slave (P. A. S. P. vol. XXV. p. 22) — *cf.* the case of a mother-in-law under similar circumstances, who, if she murders her daughter-in-law, may be held capitally liable.

A parent may, apparently, for good cause shown, sell a child of tender years; but not apparently for lust of gain. Such cases are to be

judged according to their merits. The power however exists, and is exercised (*v.* also *Master and Slave*). This power does not extend to those who stand merely *in loco parentis*, and selling by such a person will be treated as kidnapping in the 2nd degree (H. A. H. L. vol. XX. p. 22): and *a fortiori* the power does not extend merely to those who have charge of a child, under penalty of the heaviest form of military servitude. It makes a difference if the child is over ten.

A person who causes his parents death, directly or indirectly, intentionally or accidentally, is liable to capital punishment, generally of the more severe kinds — and, if the act be intentional, to the extreme penalty of the law. From its indirect aspect, the subject is closely connected with the curious position of responsibility (*q. v.*); but, on the consideration of its direct aspect, a few words may be offered.

The position of an offender who directly, and intentionally, kills his parents, is obvious — the penalty being the lingering death.

The position of an offender who directly, though

accidentally, causes his parents death, is not so clear. By the old law, a woman, who was the accidental agent of her parents' death, was sentenced to strangulation subject to the presentation of a confidential report to the Board — with the result of commutation to transportation redeemable by fine: a man, on the other hand, and under the same circumstances, would be actually transported. Later legislation, therefore, provided that the sentence of death should not be commuted as a matter of course, but should be considered at the Autumnal Revision, and dealt with as circumstances required (H. A. H. L. vol. XLIV. p. 19). An inspection of the cases on the subject shows, however, that, in practice, accidentally causing the death of a parent is invariably treated much more severely. Thus, in the case of T'an Ya-chiu 譚亞九, wherein it appeared that a man had been struggling with the offender's mother, and the offender, throwing a stone to make the man unloose his hold, by accident hit his mother and killed her. The offender was thereon sentenced to the lingering death, subsequently commuted by special degree to decapitation subject to His Majesty's

pleasure (H. A. H. L. Supp. vol. XI. p. 61). And in another similar case, a son was so sentenced for killing his father accidentally, in cutting at a man who was throttling his parent. (*id.*). In another instance, a lunatic was beating his father, and his brother in trying to separate the pair, accidentally knocked his father on the head and killed him: for this, the lunatic was sentenced to lingering death, and the brother to decapitation subject to His Majesty's pleasure (*v.* case of Chang Ch'u-lao 張初老 (H. A. H. L. Supp. vol. XI. p. 62). It must be noted, as has been already stated (*v.* Lunacy), that lunacy is no defence. Then there is the case of Li Yung-ch'ing 李泳慶, sentenced to instant decapitation, as a mitigated penalty, for shooting his father in mistake for a midnight robber (H. A. H. L. Supp. vol. XI. p. 58): and the case of Sun I 孫義, who catching his footman in his wife's chamber, in a fit of righteous wrath 激於義忿 — as the Board says — lunged at him with his sword, and accidentally struck and killed his mother, who had popped out from behind him. Taking all the circumstances into

consideration, as an act of special grace, His Majesty commuted the sentence of lingering death to immediate decapitation (*id.*). Even where the death is the result of causes clearly and completely beyond the control of the son, yet the capital sentence must be recorded. So, in the case of Mrs Fang *née* Yüan 方袁氏, the mother's death resulted from her clutching her daughter by her dress behind — with the effect that the latter stumbled back upon her mother and knocked her down (H. A. H. L. vol. XLIV. p. 18); and, in the case of T'ang Ming 唐明, a son had scalded himself with some boiling water, and his mother running up to see what was the matter, slipped upon some of the water, stumbled, and killed herself (H. A. H. L. vol. XLIV. p. 22): and, in the case of Chou San-êrh 周三兒, the death was the effect of a chill, and had no connection with a blow that the offender had struck his mother (H. A. H. L. vol. XLIV. p. 23). The subject is one which offers its fair quota of curious — if not inconsistent — cases. Thus *cf.* the cases of Li T'ing-chên 李廷珍 and Li Hung-ku 李紅拈; in the

former of which a son killed his father striking at a supposed thief, and was merely bamboosed and transported: in the latter, a son, struggling with a supposed thief, fell back and knocked his mother down and killed her, and for this was strangled (H. A. H. L. vol. XXVI. pp. 12—13).

A person who merely strikes his parents, without causing death, is liable to capital punishment — generally strangulation, sometimes decapitation subject to revision. So, in the case of Su Ch'ao-tzu 蘇朝滋, a lunatic was sentenced to decapitation subject to revision for wounding his father in a fit of madness (H. A. H. L. Supp. vol. XI. p. 59).

A person who causes his parents to sustain corporal injury directly or indirectly is also liable to capital punishment — generally subject to revision, though sometimes not. So, in the case of Jung Ta-ch'uang 榮大壯, a lunatic throwing tiles off the roof of a house, accidentally hurt his father, who had rushed out to see what was the matter. The father recovered, but nevertheless the lunatic was sentenced to decapitation — the

offence being considered more serious than that of his subsequently killing two other persons, and wounding a third. And, in the case of Wang Yü-kao 王於告, the offender, in trying to prevent his mother from running forth into the street, during a fit of lunacy, caused the woman to tumble down and hurt herself. She recovered perfectly, but the offender was sentenced to death without revision — a special report however being allowed to be presented to the Throne (H. A. H. L. Supp. vol. XI. p. 63).

A person who brings any charge against his parents is liable to capital punishment (H. A. H. L. vol. XLVIII. p. 86), and the duty of the offspring is to condone an offence, and shield the parent (*v. General Influence of the Consideration of Relationship*). If, however, the parent be guilty of treason, not only must the children not condone the offence, but they must suffer punishment as well as the parent — being castrated (*v. Punishment — Castration*). Further, in cases where four persons of a family are murdered and the succession is cut off thereby, not only is the murderer rightly enough condemned

to the lingering death, but his male children, irrespective of age, are to be executed also — so long that the number does not exceed that of those murdered; and the wife and daughters of the murderer are to be given as slaves to the relatives of the murdered persons, if they will take them — otherwise they pass to the Tartars in Ili. In the case of Wang Chih-pin 王之彬, a child of ten was condemned to death for murders by his father (P. A. S. P. vol. XIV. p. 8). And in another instance, for murders by their father, the children were condemned to be castrated; escaping capital punishment, however, because three persons only were killed — but the escape was very narrow, for a fourth person, on whom the hopes of a succession depended, had been severely injured by the murderer, and had he not recovered the children would have been executed.

A son must maintain his parents if they are in want. If he fails to support them properly, even though he has used his best efforts, he will be liable to three years transportation and one hundred blows, if the parents commit suicide or their death is caused thereby: and in such case,

if the son has used no special effort, he will be liable to penal servitude for life (H. A. H. L. Supp. vol. XIII. p. 6). The son is thus liable in any case, the reasoning being that if a son has no ability to trade, he can always learn a handicraft, or earn a living as a coolie; perfect cripples may be excused perhaps, but if a son can walk, he will be liable, though one leg is shorter than the other (H. A. H. L. vol. XLIX. p. 63).

A son is naturally bound to defend his parents in every way possible; and further if he kills his father's murderer upon the spot, he will be let go free; and if he do so subsequently, he will only be bamboosed. It is somewhat otherwise, however, where the aggressor is a relative; for the above-mentioned rule applies to outsiders only; and though a son is justified in trying to save his father from the violence of his elders, he must not use force towards them. There is a curious case on the point, wherein two sons killed their uncle, who had that moment killed their father; the capital sentence was remitted on the ground that the uncle being a younger brother had put himself out of the pale of the law by the murder

of his senior — had it been the other way, however, the sentence would have stood, though, under the circumstances, it would not have been carried out (P. A. S. P. vol. XXVI. p. 7). Though, however, a son is practically justified in nearly every instance in killing or seriously wounding in a parent's defence, it is not allowable to plead the clause and statutes relating hereto, in cases where a son enters into a quarrel or affray jointly with his parents.

The tie of consanguinity is not broken by the re-marriage of the mother. So in the case of Chang Yüan-shih 張元士, the prisoner's mother had married again, and the prisoner, who had killed her second husband's son in her defence, was excused the homicide, on the ground that he stood in the relationship of son to her, and that the tie was not broken by her re-marriage 該犯與徐氏有母子之親徐氏雖經改嫁子無絕母之義 (H. A. H. L. vol. XLIV. p. 97). And further with regard to the position of the children of a former marriage as respects the second husband, relationship exists between the parties, whether the second husband

support the children or not; the penalty for killing them is less by two degrees, however, if the second husband supports them, and by one degree only, if he does not do so: and, in either case, if the killing was intentional, and from cruelty or temper, the relationship is thereby broken, and the slayer will be given the full penalty of his crime. Thus, on the latter point, there is a brutal case, wherein a man kicked his wife's child to death, and subsequently mutilated it to prevent recognition. The Provincial Authorities sentenced the offender merely to one hundred blows and transportation for life — the penalty for killing a nephew. The sentence was, however, disapproved by the Board — the proper penalty being, as it was pointed out, decapitation — though the child had come to the second husband with its mother, on the understanding that he would bring it up. And so, also, in the similar case of Wang San 王三, wherein the step-father for so behaving to his six year old step-child was sentenced to strangulation (P. A. S. P. vol. XXVI. p. 4). And thus, similarly, with a step-mother who behaves brutally to her step-child: as in a case wherein

a step-son was buried alive, to get him out of the way of the step-mother's own offspring. This was a clear case for strangulation, though the Board, on the ground that the woman did not obtain the property, thought differently — yet, as she showed a cruel and wicked disposition, it was ordered that she be transported as a slave to the frontiers, and the usual commutation to a fine be not allowed (H. A. H. L. Supp. vol. XII. p. 3). Further, the tie subsisting between the step-parent and the step-child is not close enough to prevent somewhat rigorous punishment for a step-father who unreasonably corrects his charge — as where, for instance, he kills the child because it is dumb, and creates a disturbance when it feels hungry.

Adoption. — This is very common in China, where the continuity of the family is thought of very first importance. If a man be childless, and increasing his domestic relations does not repair the difficulty, he will take his brother's second son, if he has one, or perchance a nephew — the senior of whom, if he be not an heir, having a prior claim; or, in default of a nephew, a child of an

entirely different family may be adopted — the child changing its name.

If the parent be absent, it would appear that the head of the clan may, with the approval of the clansmen, appoint a successor 徐姓族長徐思和因徐進發之父徐思海早年外出未回家產無人照管與族人說合將徐進德出繼與徐思海爲嗣寫立過單 (H. A. H. L. vol. VIII. p. 8).

An adopted son stands in the same relation to his adopted parents as a real son. If he beats ill-treats or kills his adopted parents, he will be tried and condemned under the special statutes for enforcing filial piety. If he disobeys his adopted parents, they may have him transported to the plantations; but *ex converso* 以此隅反 if he kills a man in their defence, he may plead justification (H. A. H. L. vol. XLIV. p. 92).

There is an objection legally in making an adopted son an heir, if he does not belong to the same clan as his adopted father (*id.*).

As regards the other relations, an adopted son stands only to a limited extent in the

position of a real son. He will be dealt with as a servant in the family, if he offend against his adopted father's cousins: but the relatives cannot claim *circonstances atténuantes*, if they offend against him (cf. case of Hou Mêng-pu 侯夢卜 — P. A. S. P. vol. XXV. p. 10): and the relatives have no right of life and death over him.

Illegitimate Children. — An illegitimate child follows the father, is to take his name, and be supported by him, or if he be dead by his family — but *semble* has no right to share the paternal property (H. A. H. L. vol. LII. p. 46). It would appear from the case of the Gioro T'ang Wu-t'u 唐武圖, that it is no offence to kill an illegitimate child, if the killing be done at or before birth (H. A. H. L. vol. XXVI. p. 24): and it is but a trivial offence — sixty blows and a years' transportation — if the killing be done after birth, and after the child has been maintained for some time. Indeed, it is a worse offence to stab the mistress than to stab the child, though no serious hurt be done her (H. A. H. L. vol. XXVI. p. 25). It is not allowable to abandon an illegitimate child, save

for good cause shown; and *a fortiori* to take exception to and abandon in the woods the offspring of the mistress by another; and it is objectionable and punishable to deposit such offspring on the door-step of a neighbour (H. A. H. L. Supp. vol. VII. p. 22).

SECTION III — HUSBAND AND WIFE

HUSBAND AND WIFE

A Chinese has but one wife 妻, though he may in addition keep concubines 妾, or as they are sometimes termed, secondary wives: both enjoy a legal *status*. The distinction between the two is great in reality; though occasionally, as will be noticed, the terms are conjoined or assimilated. A man's wife is considered as related to all his family: his concubines are not so considered: nor does the title of "seniors to be "treated with respect" 尊長名分, attach to the latter (H. A. H. L. vol. IX. p. 43). To degrade a wife to the level of a concubine, and elevate

a concubine to the *status* of a wife, is strictly illegal. And, firstly, as to marriage.

Marriage. — I. Regarding the *contraction* of the marriage tie: — (*a*) Certain persons must consent to the contract: the *consensus* of the parties themselves being unimportant — the said parties being, in fact, parties to a contract agreed on by others: (*b*) Certain formalities and ceremonial must be complied with: (*c*) The respective position of the parties may affect the validity of the marriage. Of these in their order.

(*a*) and (*b*) consent and ceremonial.

Before any legal considerations operate, certain introductory enquiries etc. must be made. Thus it is necessary that the families interested should assure themselves as to the physical capacity of the respective parties — whether in regard of age, infirmity, or disease. After this enquiry, it is customary for the parties acting for the bride to send to those acting for the bridegroom, a note of eight characters 庚帖, representing the year, month, day, and hour, of the bride's birth. If the aforesaid enquiries be satisfactory, and the

junction of the respective lots of the parties be propitious, the marriage articles are drawn up, and the amount of the marriage gifts determined. On the recognition of the articles, either by the exchange between the negotiating parties of personal interviews with verbal assent, or actual written assent, and subject, furthermore, to compliance with certain ceremonial, such as the bride's home-coming, receipt of gifts etc., the parties are fully bound by the legal *vinculum*, and enter upon the responsibilities of the marriage state. Breach of promise of marriage is not punishable heavily, and no legal liability of any kind is incurred until the recognition of the marriage articles (*supra*).

On certain of these details in their order.

To constitute a legal marriage the written assent of the relatives of the woman must be obtained; it is not sufficient that the woman is perfectly willing, if the relatives withhold their assent (H. A. H. L. vol. IX. p. 36). The consent of the father of the woman will suffice without that of the mother, but not *vice versâ*. In the event of the death of either parent, the

consent of the survivor will in any case suffice. An agreement entered into by the respective parents on either side, on behalf of their respective children, while the latter are still infants, provided the proper registers of name and birth have been mutually exchanged, will constitute a binding contract, and no subsequent ratification is necessary.

It is held a marriage, though it be not consummated, provided the betrothal is regular **按法則以聘者即有名分** (H. A. H. L. vol. VIII. p. 4): but any irregularity impairs the efficacy of the tie. So, in a case where the original intended had left for parts unknown, without having taken his wife to his home, and the younger brother after eight years' waiting stepped into his shoes.

The receipt of the wedding gifts by an unauthorised person does not constitute a legal betrothal (H. A. H. L. vol. IX. p. 34).

It is not held to be a complete marriage, though the assent of the parents has been given, and the wedding presents received **向父說允收受財禮**, if the marriage lines have not been

given to the bridegroom 未給婚書 (*id.*).

As regards dowry, a wife sometimes brings it, sometimes not: generally the contract provides for the payment of earnest money, varying in amount with the condition of the parties.

If there be fraud the marriage is null; and though the parties do not separate as by law provided, the wife will not incur the responsibilities of the married state. Thus, in the case of Mrs Wang 王氏, an old reprobate, knowing that the girl's parents would refuse him, sent a good looking young nephew to represent him in the preliminary stages — and thereby got the contract signed, and obtained possession of his bride. He ill-treated her, and she subsequently strangled him — the case being treated as simple unjustifiable homicide of a man by whom the woman had been injured.

It is an offence to marry or to stand affianced during the legal period of mourning for a father, mother, father-in-law, mother-in-law, and husband (on this last point *v. infra* — *Position of Parties etc.*) — the penalties varying from 100 blows downwards, according to the nature of

the relationship, the stage attained in the nuptial agreement, and the respective *status* of the parties. It is also an offence, punishable with 100 blows, to marry during the imprisonment of parents or grandparents for a capital offence.

As regards the placing of the responsibility where a marriage is contracted contrary to law, the rules are various, and in some points are dealt with incidentally, as touching particular cases. Three general rules may be given. Firstly, if the giver-away of the bride, or the contractor of the marriage on the part of the husband, is the paternal or maternal grandfather, grandmother, father, mother, paternal uncle or aunt, or paternal elder male or female cousin, the punishment prescribed by law will be inflicted on such relations only, and the parties will not be held responsible. Secondly, where the giver-away, or contractor, is a more remote relation than above stated, but is the chief agent in procuring the unlawful marriage, such giver-away or contractor will be punished as principal, and the married parties as accessories. Thirdly, where the unlawful marriage originated with the parties themselves, they will be punished

as principals, and the go-betweens as accessories. In regard of this latter rule, however, distinction must be drawn between cases which originated with the act of the parties, and cases where the parties 'instigated' others to contract the unlawful marriage. Strange as it may seem, where the marriage was contracted 'at the instigation and 'request of the parties', all concerned will be punished as principals.

(c) Position of the parties and effect thereof.

In regard of the position of the parties, relationship, whether natural or artificial, may bar marriage. So inter-marriage is forbidden between relations by blood or marriage to the fourth degree, between persons of the same family name, and between free persons and slaves. The mere position of a person may bar marriage; as in the case of a Buddhist or Taoist priest, or in the case of a female offender who has escaped the clutches of the law. Where the above illegal and abortive marriages are formed, penalties of a varying number of strokes of the bamboo are incurred. But a heavy penalty occasionally attaches — thus it is strangulation to marry a deceased brother's widow.

On certain of these points, and other incidental considerations, in their order.

A man may not marry the wife of any relative for whom he has to wear fine hemp as mourning. If the parents arrange the marriage 主婚, the penalty attaches to them alone. If a relative arranges the marriage of his own motion, he will be punished as principal and the parties as accessories: if he arrange it at the instigation of the parties, the parties will be punished as principals, and the relative as an accessory. The penalty for illicit carnal knowledge in the foregoing instance is, for the principal, one hundred blows and three years' transportation — if the relationship of the deceased necessitate the wearing of the finest grades of fine hemp mourning; and sixty blows and one years' transportation — if the aforesaid relationship necessitate the wearing of the less fine grades of fine hemp mourning. Accessories are to receive one hundred blows, irrespective of the grade of mourning used. By a later statute, the penalty for such illicit knowledge was modified to transportation to the frontiers. If principals are allowed to commute the penalty, persons dragged

into the case by them are also allowed the same privilege.

A man may not marry his deceased brother's wife under penalty of death, although he may marry the said wife's sister, without waiting for his brother's decease.

A mother and daughter may not marry a father and son; if they do so, the daughter's marriage will be considered null — though it does not seem to be a very serious offence for the mother to live with the father (H. A. H. L. vol. XLIV. p. 17).

An official must not marry within his jurisdiction. A peculiar instance is that of a head constable, who was degraded and given eighty blows, for marrying the daughter of an offender under his charge (H. A. H. L. Supp. vol. III. p. 31).

An official must not buy a concubine within his jurisdiction under penalty, nominally, of eighty blows, but in reality, of fine, degradation of three steps, and removal.

A person having official rank must not marry, or take as a secondary wife, an actress, or one of the *demi-monde*. Thus, in the case of Tè Ying-o

德英額, a member of the Imperial Family was sentenced to sixty blows — to be actually carried out — for taking a singing girl as a secondary wife merely (H. A. H. L. Supp. vol. III. p. 60).

A betrothed girl may not marry her deceased bridegroom's brother under penalty of death; and distinction is drawn between this, and a woman marrying her deceased husband's brother — wherein, if her elders arranged the marriage, the woman may escape punishment.

If her intended be lost to sight for three years, his betrothed wife may marry again, by giving notice to the authorities — but he must be really lost sight of, not merely absent on business. When her intended returns, his betrothed reverts to him.

If a widow wishes to again marry, her intended must obtain the consent of her parents, and that her mother-in-law consent, is not sufficient. So Kao Ch'êng-yung 鄒成用, was sentenced to military servitude in the salt mines, for carrying off a widow — though her mother-in-law was agreeable to her marriage — because two people involved in the case had chosen to commit suicide (H. A. H. L. Supp. vol. III. p. 32). The marriage must

also be arranged by the deceased husband's father or uncles, though if the widow's deceased husband left no persons qualified to dispose of her, her own mother may take the place of such persons
夫族無人應歸母家主婚 (H. A. H. L. vol. IX. p. 34).

Again a decent interval must elapse before re-marriage — and a woman who marries again, before the period of mourning for her husband is over, is a naughty woman, and the second marriage will be dissolved (case of Mrs Wang 王氏, and Mrs Sun 孫氏, H. A. H. L. vol. III. p. 46). But, to be so treated, the second marriage must have been consummated, and she must have gone to her new husband's house. It would appear, however, that if the woman only married again because her late husband's family worried her to do so, since they were too poor to support her, the law will allow that there is some distinction to be made — and though she is not to be considered a proper person, she is not to be stigmatized as a wicked woman. She is something between the two (case of Mrs Tai 戴氏, H. A. H. L. Supp. vol. III. p. 48).

A widow who re-marries, even though her husband died while she was yet a child, and notwithstanding compliance with all formalities, is nevertheless looked down upon; but, inasmuch as there is no general law *prohibiting* a widow from marrying, the discomfort of public contempt is frequently endured. It is not well to press a suit too hardly on a widow — for if she prefers hanging herself to marrying her suitor, he will be sent to the frontiers for military servitude (H. A. H. L. vol. III. p. 30). Nor is it well for a son to force his father's secondary wife to marry again — if she does not want to (*id.*).

Buddhist and Taoist priests may not marry, under penalty of 100 blows and expulsion from their order.

A person may not marry a female fugitive from justice, under penalty of incurring the punishment due her, less two degrees.

II. As regards the *dissolution* of the tie. — If a man be impotent, he can, it appears from a case, be forced to give his wife a deed of divorce, and if she has behaved well during the time she has lived with him, she may be allowed

to retain her dowry. In the case referred to, it is, however, to be noted, that the girl had lived for eight years with her incomplete husband, that during this period she had dutifully attended on her mother-in-law, and that the decree, in the first instance, was that half the dowry only should be returned (*v.* the 資治新書, vol. XX. p. 25).

It is an offence for a husband to sell 嫁賣 his wife to another — involving all concerned in the penalty of one hundred blows; while the woman is divorced from both husbands, and given back to her family. Yet the law will sometimes sanction such a sale, where the husband is too poor to maintain his wife, and she has no family to go back to; and will confirm the second marriage (H. A. H. L. vol. LII. p. 49); and, in fact, the practice is, in general, though illegal, allowed — save under aggravated circumstances (*v.* p. 186).

To trade on a wife's honour is also good ground for the dissolution of the marital relationship, and, on notification to the authorities, the parties are to be separated, and the woman given back to her relations.

But the grounds upon which a wife may obtain divorce from a husband are few and cogent compared with the reverse case. Talkativeness, wantonness, theft, barrenness, disobedience to a husband's parents, jealousy, inveterate infirmity, are all valid reasons; and these, which are known as the seven valid grounds for divorce, do not exhaust the list — other reasons, such as infidelity (*infra*), having been subsequently added by statute.

In regard of a wife's disobedience to the husband's parents, the right course is for the husband to hand her over to the authorities first of all.

In regard of talkativeness, a wife must use discretion, and keep her tongue under discipline: she should even forbear though her husband comes home drunk — even to such an extent as to be unconscious of what he is doing 酒醉無知.

In pleading the statute in regard of infidelity, it may be remarked that it is an immaterial point whether or not the marriage was legal in the first case, provided the parties had been

living together as man and wife (H. A. H. L. vol. XXVI. p. 7): in other cases, the legality of the marriage may or may not be an important consideration, according to circumstances.

The sundry reasons for which a wife may be divorced are subject to three equitable exceptions, namely: — (*a*) where the wife has for three years mourned for her husband's parents; (*b*) where the family has become rich after having been poor previous to and at the time of marriage; (*c*) where the wife has no parents living to receive her back again.

In addition to the reasons for which a husband may divorce a wife, or a wife obtain divorce from her husband, there is a good mutual ground on which the parties may obtain divorce — namely, where the parties do not agree, and are desirous of separation.

Where the divorce is complete, the marriage relation is yet considered to have some force, if the wife has not married again and wishes to return again to the husband (H. A. H. L. Supp. vol. XI. p. 14): if the wife has married again, all previous marital relationship, and ties due

thereto, are severed (H. A. H. L. Supp. vol. XI. p. 11). The effect of a divorce may, therefore, give rise to strange judicial decisions; as in the case of Shèng Fù-hsien 盛幅賢, wherein it was laid down that where a divorced wife and her child were murdered, they could not be considered as members of the same family (H. A. H. L. Supp. vol. VIII. p. 56) — a parallel with the Countess of Suffolk's case.

Effect of the relationship of husband and wife.—Husbands have very considerable powers of life and death and otherwise over their wives — yet subject, also, as will be seen, to considerable limitations.

A husband who kills his wife will, in general, only be sentenced to strangulation subject to revision, whether his crime be deliberate, pre-determined murder, or whatever the circumstances may be (*cf.* the reverse case of a wife killing her husband — the sentence being decapitation).

Circonstances Atténuantes are allowed, as a matter of course, if a husband kills his wife for striking his parents or himself — even if the

wound inflicted be but a scratch. But the most violent conduct on the wife's part, if she does the husband no actual bodily harm, running away even (if she does not play the harlot), will only enable the husband's name to be put on the list of Cases Reserved — *v.* cases of Li Chiang 李江, and Tsou Kuo-hsien 鄒國顯 (H. A. H. L. vol. II. pp. 26—27).

If a wife for whose death the capital sentence has been recorded against the husband is shown to have been undutiful, or to have given him just cause for anger, further commutation to one hundred blows and three year's transportation will be accorded, on the case coming up for revision at the Autumn Assize, in place of the ordinary commuted sentence of transportation for life (H. A. H. L. vol. XL. p. 26).

In the case of adultery, a husband may kill both his guilty wife and the adulterer, if he catch them *in flagrante delicto*, but, whether in the case of the adulterer or the wife, he should do so on the instant (H. A. H. L. vol. III. p. 55); though it is also allowable for the husband to kill the adulterer outside the house, if it be in

chase. But if the husband first ties up the adulterer, and then kills him, he will be guilty of a transportable offence (*id.*). The parties must of course be properly married. If the husband kills his wife afterwards, he will be liable to three years' transportation and 100 blows; and though it be four years afterwards, and though he has apologized, so will the adulterer.

It may be remarked here, also, that in regard of attacks upon the chastity of a wife, a father, mother, father-in-law or mother-in-law stand in the same position as the husband, and what he may do to the man who attacked his honour, they may do also. And the privilege extends to a father by adoption, and to the mother who has brought a man up. But brothers, uncles etc., have not such a right; for the feeling is not the same, nor the authority to act so full — it does not touch them so closely 其情稍疎於本夫其分稍減於父母 (H. A. H. L. vol. XXVI. p. 17). Though, however, these relatives have no right of killing, they will only be partially responsible for mere severe injury they may inflict while interfering — and for

slight injury, not at all. But other more distant relations will be liable in any event, for the law discourages undue interference.

The common practice of selling a wife is *per se* illegal (*v. p.* 181), and in theory only allowed under exceptional circumstances (*id.*); in practice, however, it is "winked at". Aggravating circumstances alter the case; *e. g.*, if the woman does not like to be so disposed of, and commits suicide in consequence, the practice becomes comparatively serious — the old husband receiving three years transportation, and the new one and the matchmaker two years each (H. A. H. L. Supp. vol. III. p. 56). So in the case of Huang Tè-hsiu 黃德修, wherein a husband was sentenced to three year's transportation and one hundred blows, because his wife committed suicide rather than consent to be sold to another husband (*id.*).

In correcting his wife, a husband must exercise his judgment; it is in itself no offence to strike his wife; but if he knocks her brains out, when told by his mother-in-law to give her a whipping, he will be responsible for the murder (H. A.

H. L. Supp. vol. XL. pp. 16 & 17). The wife must bring her action in person, otherwise none will lie (*id.*).

If a husband rupture his wife, in an attempt to force her to submit to his wishes, it is an assault, and renders him liable to the full consequences — *v. decision of the Board in the case of Lu Ch'ao-fan 陸超凡* (H. A. H. L. vol. XL. p. 16).

If a husband trade on his wife's honour, the marital relationship is extinguished — with the result that if he subsequently kill her, he cannot claim the privilege of a husband in mitigation of the penalty.

It would seem that a husband can claim no marital rights, if he has been for five years in exile, without writing to his family, and his wife has in the meantime married again — although the law is not clear on the subject (H. A. H. L. vol. XL. p. 1).

The reader will remark, no doubt, that, as far as can be judged from the foregoing, a wife is, on the whole, regarded somewhat tenderly, and that her peace of mind and liberty are

carefully and equitably considered — which is, perhaps, true, legally. The case of P'ei Ping-jo 裴秉若, will, however, show that, in practice, marriage may not be an enviable state in China, and that a husband may be dyed in the blood of his wives and concubines, before he can be permanently removed. In the case mentioned, the offender seems to have been a regular Blue Beard, who had married five wives, one after another. His first wife, he drove to hang herself, his second, to drown herself, his third, to suspend herself to a tree — one only dying a natural death. He had also taken to himself four concubines, one of whom alone survived. The first having been beaten to death, the second forced to run away, and the third flogged and burnt with red hot irons, so that she died. To vary the amusements, he was said incidentally to have beaten to death a slave girl and waiting lad. Left with his wife and concubine, he amused himself with sticking a knife into the fleshy part of the one (once indeed cutting a rump steak from her and eating it with his wine), and burning the other with hot irons, or beating her, as the

humour seized him. For these several enormities, he was declared unfit to live, and as the murders he committed scarcely involved more than strangulation subject to revision, a special decree was issued, and his immediate decapitation ordered (H. A. H. L. vol. XL. p. 49).

If a wife kill her husband, though without intention, she will be sentenced to decapitation; and even if it be a case where there are no aggravating circumstances, the sentence is left undisturbed to be carried out or not, as may be; but if there are extenuating circumstances, the Board will apply for leave to alter the sentence to decapitation subject to Revision at the Autumn Assize (H. A. H. L. vol. XL. p. 42).

Until the 7th year of Ch'ien Lung, if a wife beat her husband, or if the wives primary and secondary beat each other, the penalties incurred thereby were commuted by a fine which the husband had to pay. But the incongruity being then pointed out, it was decreed that, where a husband, on being beaten or injured, demanded a separation from his offending wife, the sentence should not be commuted by fine, but executed:

though if the husband forgave his wife, it was only fair of course that he should pay her fine. Where the wives fought, and the law had to intervene, it was also decreed, that such part of the sentence as involved corporal correction should be carried out, and the other portion commuted (H. A. H. L. vol. XL. p. 6).

If a wife strike any of her husband's relations in the first, second, third, or fourth degree, she will incur the penalty to which her husband would have been liable had he so done — the punishment not, however, to exceed transportation for life and one hundred blows, except in cases of death arising from the blow, when the wife becomes liable to decapitation, if it be a senior relation who dies, and to strangulation, if it be a junior relation. In this connection, it is convenient to notice that a widow, who strikes the parents of her deceased husband, is liable to the same penalty as if such husband had been living.

If a wife be induced to elope, she will be sentenced to one degree less punishment than her seducer *i. e.* to one hundred blows and

three years transportation — the former to be carried out, and the latter to be commuted for a fine (H. A. H. L. Supp. vol. VII. p. 22).

If a wife commits adultery with the consent of her husband, and the paramour kills the latter, the wife will not be punished as being responsible for her husband's murder, provided she knew nothing about it. She will however be punished for her immoral behaviour, and she is under an obligation to give immediate information regarding the murder, and, moreover she must not have any further relations with the murderer, or she will not be allowed to escape thus easily (H. A. H. L. vol. XXIV. pp. 56 & 57). But where the husband was not a consenting party, and the paramour kills him, the wife will be capitally liable, whether she knew anything about it or not: grace only being shown where the murder was sudden and unpremeditated, the lover killing the husband in the hurry of trying to escape; and then, again, only if the wife fly to the rescue, and give the alarm, and do her best to bring the murderer to justice, by denouncing him to the Authorities —

when penal servitude, ordinarily redeemable by fine, will be inflicted. Again, in respect of the infliction of the capital penalty in these cases “the death penalty can only attach to the wife “after her paramour had killed her husband”

且必於姦夫既殺其夫而後絞罪始定, and “cannot attach to her in anticipation “before her paramour had killed her mate” 不能於姦夫未殺其夫之先預坐 (H. A. H. L. vol. XXVIII. p. 13).

Finally, a few words as regards the respective liability of the parties for offences committed by one or the other. A husband is usually to some extent liable for the offences of his wife; but his punishment is not heavy therefor — the wife as a rule suffering principally. A wife may, in certain cases, be held partially liable for the offences of her husband; as in the case of treason by the latter, when, on his punishment, she will be punished also — by being given as a slave to a meritorious official. Again if the husband be banished for an offence, though it is now in general optional with the offender whether his

wife accompanies him or not, yet, in Mongolia, it is the rule that, if the offence, for which the man is banished, was participation in robbery and murder, or the taking of a principal part in robbery with violence, his wife also must be sent with him into service with the garrisons (H. A. H. L. vol. XVI. p. 28).

SECTION IV — OTHER NATURAL RELATIONSHIPS

OTHER NATURAL RELATIONSHIPS

Fathers and Mothers-in-law; Sons and Daughters-in-law. — These relations are regarded with solicitude. So in the case of M^{rs} Li née Wang 李王氏, a woman tired out with reaping, slipped and caused her father-in-law to hurt himself, and only as a special favour was allowed to pay a fine, in place of the penalty of one hundred blows and three years' transportation (H. A. H. L. Supp. vol. XI. p. 64).

It is more serious to kill one's mother-in-law than to kill one's wife — a possibly wise provision :

but, if the mother-in-law has led one's wife astray, or been a party to her desertion, the relationship between son-in-law and mother-in-law, and the consequences thereof, come thereby to an end. And so in the case of Li Hsiao-shêng 李小生, who tied his mother-in-law's hands behind her back, burned her with joss-sticks, and generally did her to death. In the first instance, Li was sentenced to decapitation, but, on its appearing that the mother-in-law had been a consenting party to the wife contracting a second connection, the finding was quashed (H. A. H. L. Vol. XL. p. 53).

A mother-in-law must be careful about killing her daughter-in-law — for it is considered worse than killing her own child; and she must be careful also as regards throwing the body into the river — for it is considered worse than so treating the remains of her own child: though, so far as relationship is concerned, her offspring and a daughter-in-law stand on the same footing, yet the feeling is not the same (H. A. H. L. vol. XXI. p. 12).

A father-in-law who, contrary to his own father's wish, beats to death or otherwise kills

his son or daughter-in-law, and although for good cause, will not be supported by the law — as in a case where a father-in-law beat his daughter-in-law to death for disobedience, contrary to his own father's injunction (H. A. H. L. Supp. vol. XI. p. 64).

The tie existing between the father and mother-in-law and the wife does not cease to exist on the husband's death — although the wife marries again; but it does cease to exist, if the parties are divorced (*q. v.*), and the wife takes another partner. Nor does the tie necessarily have no existence if the marriage was illegal — provided that it was public, and contracted in ignorance of the law.

Uncles and Aunts; Nephews and Nieces. — These relations are regarded with solicitude, and the relationship is one of considerable weight. For a nephew or a niece to kill, or severely wound, an uncle or an aunt, is a capital offence; and this, whether the killing or the wounding be intentional, or accidental, or even morally justifiable. So to kill an uncle or an aunt in self-defence is a capital offence. In the case of

Mrs Chou 周氏, an aunt in trying to strangle a niece in the dark, placed a finger in her intended victim's mouth. The niece, not knowing who it was, and imagining it was someone trying to ravish her, bit the finger off: erysipelas supervened, and the aunt died. For her offence, the niece was sentenced to strangulation without revision (H. A. H. L. Supp. vol. XI. p. 63). Even to merely severely wound an uncle or an aunt is a case for a capital sentence; and this though the act was done in defence of a parent — but, in the latter event, the sentence will be nominal, and subject to commutation. Thus in the case of Ch'ang Hsiao-liu 長小六, a nephew crippled his uncle in the endeavour to prevent the latter from braining his father. The nephew was sentenced (but sentenced only) to strangulation (H. A. H. L. Supp. vol. XI. p. 56).

An uncle or an aunt may, apparently, with some impunity, murder a nephew or a niece. So in the case of Hsia Shêng-pa 夏勝疤, a brute who was threatened with legal proceedings murdered his young niece — with the intention of charging his opponent with the act. The murderer

did not indeed escape immune; but received the benefit of his relationship, and was merely sent to military servitude (*ante* — *Inequality of Action of Courts*). It is, however, submitted that the above case is not a true exposition of the law on the point. The case of M^{rs} I *née* Hsiao 易蕭氏 seems little better authority. In the latter case, an aunt punished a thieving niece by drowning her, and was not allowed the benefit of her relationship (*id.*). This case seems to err on the one side, as much as that of Hsia Shêng-pa does on the other, and the true rule must lie something between the two decisions: — *i. e.* the *jus vitæ necisque* attaching to the position of uncle or aunt must be reasonably exercised, and subject to all the circumstances of the case.

Brothers. — These relations are obviously more on an equality, but distinction is drawn between elder and younger brothers. So if an elder brother kill his junior, the penalty for homicide will be reduced; and if the junior has in any way deserved so to die, the penalty will still further be reduced — as in the case of Wu Kuo-chên

吳惲畛 (H. A. H. L. Supp. vol. XI. p. 57). In the case of Chou Yung-t'ai 周泳太, the offender, hearing a mad dog barking during the night, endeavoured to shoot it, and killed his brother who was lying out in the open drunk. The Court was ready to admit that the offender had no intention of injuring any one, and did not know that his brother was anywhere near — but sentenced him to transportation for life (H. A. H. L. Supp. vol. XI. p. 48). In the case of Lai Ts'ai-yün 賴彩雲, extenuating circumstances were admitted, the case being of a peculiar nature — the offender therein assisting his uncle to drown his younger brother. It appeared that the young man drowned had kicked his uncle, and the offender endeavoured to beg him off. The uncle, however, announced his intention of pitching the saucy nephew into the river, and summoned the offender to assist him therein — the offender, in consequence, assisting under compulsion. The penalty of strangulation, to which the offender was sentenced, was in the first place 按服制 reduced to transportation for life — because the victim was a younger brother — and

then further reduced to one hundred blows and three years' transportation — because the murder was not premeditated (H. A. H. L. Supp. vol. XI. p. 57).

Sons of the same mother, but by different fathers, if living separate, do not wear mourning for each other, and are not treated as relations.

SECTION V — ARTIFICIAL RELATIONSHIPS —
 PRELIMINARY — MASTER AND PUPIL — MASTER AND
 SERVANT AND SLAVES — WET-NURSE
 AND CHILD

ARTIFICIAL RELATIONSHIPS

PRELIMINARY

Two of such relationships are considered here; but it is well to mention that there are also other relationships which have a very real meaning, *e. g.*: — (*a*) that existing between an official and the people, and *vice versa* — an official in office is considered as *parens patriæ*, and out of office may be regarded as in some sort a senior: the relationship may be further likened to natural

relationship, according to the importance of the official in question; (b) relationship between free persons and slaves and *vice versa*, and slaves *inter se*.

MASTER AND PUPIL

The relationship is of a comprehensive description, embracing that existing between master and apprentice, priest and disciple, tutor and scholar. In some measure, a master stands in the position of a near relative to his pupil — a pupil owes respect to his master, must wear mourning for him, and is punished more severely than an ordinary person, if he assaults him. As regards the respective powers and liabilities, the position of the two is, in general, regulated by the special laws affecting relations (H. A. H. L. vol. XXXVIII. p. 52). So, in the case of a master and his female pupil, if the master sticks a knife into a man who has tried to ravish his charge, he will be held excused for giving way to his righteous anger — a rule extending to the case of a nun in a nunnery (H. A. H. L. Supp. vol. VIII. p. 28).

As regards powers of correction, the limit is

reason. And to be able to exercise these reasonable powers of correction, it is essential that the master should not have forfeited his claim to the respect of the pupil. These conditions being complied with, if a master chance to cause the death of a pupil in the course of correction, the penalty will only be, at the most, transportation for life. And so with a schoolmaster, if in properly punishing his pupils, he chances to kill them, the penalty will be one hundred blows and three years' transportation — but the master cannot claim any privilege if he kills them deliberately, or uses a lethal weapon, or in fact behaves unreasonably. It is not correcting an apprentice properly, to knock him over among the pots and pans, because he is clumsy — *v.* case of Li Pang-an 李邦安 (P. A. S. P. vol. XIX. p. 35): nor for a priest to throw a stone at his disciple, because he sniggers at his mentor — *v.* case of the priest P'ei Lin 沛林 (P. A. S. P. vol. XIX. p. 40): nor to hit an apprentice so severely as to expose the bone. Nor was that head-eunuch to be commended, who twice thrashed a stupid under-eunuch so severely, that the wounds

festered, and the eunuch died — and for this the offender was sentenced to strangulation subject to revision (H. A. H. L. Supp. vol. X. p. 56).

A master must pay some consideration to the *status* of a pupil, and so may not degrade an apprentice by turning him into an actor — though with the consent of the parents of his charge (H. A. H. L. Supp. vol. XIV. p. 31).

As regards the responsibility of a tutor for a scholar, it must be remembered that the former is in a position of trust; and consequently, if he leads his charge astray, his behaviour is considered particularly disgraceful — and the penalty for his immorality will be increased two degrees (H. A. H. L. vol. LII. p. 45).

As regards the duration of the tie. In literature and philosophy, the relationship of tutor and scholar lasts from the first day on for ever; and seemingly so, also, in the case of priest and disciple: but in the case of handicraft, if the pupil be out of his apprenticeship, the relationship comes to an end — and, moreover, does not come into being, until the master has earned a right to his apprentice's submission, by having already

had him for some time under his charge. In connection also with the point as to the entry on the relationship, it is noticeable that the tie between a priest and a disciple must have been established according to legal form — *v.* case of K'ai Yieh 開月 (P. A. S. P. vol. XIX. p. 43).

Priest and Disciple. — The relation of priest and disciple is, in some ways, a curious one, and claims a slight separate notice. Buddhist and Taoist priests, on attaining the age of forty, but not before, are allowed — on obtaining the requisite licence — to take one disciple to instruct in the ways of their religion: but the applicant must be under sixteen years of age, and may not enter the priesthood, if there are not three able-bodied men left in his family. At one period no restrictions were made in this connection, but it was found advisable to legislate, by reason of persons pretending to enter the priesthood, to avoid the Government *corvées*. A priest as such has no special privileges — on the contrary, though *vis-à-vis* his disciple in the position of a senior relation (as uncle and nephew), his actions are viewed with a greater keenness

of legal vision (H. A. H. L. vol. XXXVIII. p.. 42).

MASTER AND SERVANT AND SLAVES

Slaves and servants are placed on a different footing *qua* their masters and their masters' relatives to the rest of the world, and offences committed by them are more severely visited than they would be with strangers: even in the case of manumitted slaves, the tie remains to some extent; and the free son of a pair of manumitted slaves will still be considered to stand, in the eye of the law, in the position of servant to his parents' master. An offence committed by a servant or a slave, at the instigation or order of a master, subjects the servant or slave to a reduced punishment.

Master and Servant. — To constitute the relation of master and servant, the mere fact of service for wages is not enough; and, as regards an offending servant, to bring him within the law touching the servile class, there

must have been, in the first instance, either a deed or an agreement for a term of years (not necessarily written), or the person must have been for five years or more in the employ of the particular individual (and an understanding to serve for a portion of a year at a fixed wage has been held insufficient — P. A. S. P. vol. XXI. p. 42). On the other hand, also, for a master to plead the special laws in excuse, there must be an agreement either in writing, or for a term of years (P. A. S. P. vol. XXI. p. 3). A girl brought up by a bawd, with a view to her future prostitution — although bought the first instance — is regarded neither as a servant, nor as a slave, and is not considered to owe any duty to her trainer (H. A. H. L. Supp. vol. XIV. p. 32).

It is laid down in certain cases that improper behaviour on the part of a master will break the bond binding his servant to respect him. But it does not always follow, and if a servant, under this impression, strikes his master for indecent behaviour, he may suffer heavily therefor. For the practice to apply, it would seem that

there must not only be the clearest evidence of the attempted rape (which is generally the admission of the ravisher), but also the ravisher must be twenty years older than the patient. And so in the case of Shao Hsing 邵興, where a farm labourer kicked and killed his master for making improper advances, and the Board insisted that the sentence of strangulation was not sufficient (P. A. S. P. App. III. p. 1): and so, also, in a hard case where a servant girl kicked and killed her master who was attempting to ravish her, decapitation subject to revision was adjudged. On the other hand, the relationship may not be pleaded where a master strangles his maid to prevent her letting out his little indiscretions — as in the case of Hsü Erh-ch'ieh 徐二姐 (P. A. S. P. vol. XXI. p. 35).

Offences by a servant against a master are on a different footing to offences in the ordinary way. So, of robbery, the relationship will take the case out of the category of larceny, and bring it under some other clause (H. A. H. L. vol. XVI. p. 6). So, again, to get a deed out of a master under false pretences will, if the trick be

effectual in gaining anything, subject the offender to the same punishment indeed as in the ordinary way, but under a different clause; and if the trick has not succeeded, the offending servant will be bamboozed for undutiful conduct (H. A. H. L. Supp. vol. VI. p. 35).

Master and Slaves. — Slaves are held of vile estate, and though it is lawful to apply for their registration as citizens if their master draw up deeds setting them free, yet they have only the right to cultivate the land or carry on business 只許耕作螢生, and not till three generations are passed can they present themselves at the examinations, or obtain office (H. A. H. L. vol. XLVIII. p. 83).

Slavery ordinarily arises from three causes, sale, punishment, and birth. Parents, for instance, have this right over their children by way of sale merely, or by way of punishment. The latter point has already to some extent been dealt with: as regards the former, it is to be noted that parents may sell their children into slavery, if they be driven by poverty to do so, but not for lust of gain (H. A. H. L. vol. XX.

p. 11 *et post*). So a father was punished, though with a mitigated penalty, for selling his daughter, who had been sent back to him, like a bad shilling, by her husband (H. A. H. L. vol. XX. p. 19): and so, also, a father-in-law was punished with a mitigated penalty, for selling a girl betrothed to his son, because she had a bad squint — in addition, also, the betrothal was cancelled, and the girl returned to her father (*id.*): and an official has been sentenced to an aggravated penalty, for selling as a concubine, a niece over whom he was guardian (H. A. H. L. vol. XX. p. 21).

A parent having sold his son as a slave, must not induce him to run away, or assist him in running away afterwards, under penalty of one hundred blows and three years' transportation; while the slave will, in such case (and though under the influence of his parent) receive eighty blows, for doing what he ought not to do (H. A. H. L. Supp. vol. VII. p. 20).

The Manchu Princes have the power of sending their serfs 包衣 and farmers into servitude, as parents have the power of sending their children.

So in the case of Kū Shih-k'uei 賈世魁, wherein a farmer had mortgaged his farm, and when his lord sold it, put all sorts of obstacles in the way of the conveyance (H. A. H. L. Supp. vol. II. p. 59). Dukes would also appear to have the same privilege -- to judge from a case wherein a serf had charge of his lord's wardrobe, and stole and pawned his handkerchiefs, socks and undergarments (H. A. H. L. Supp. vol. II. p. 60).

The question of slavery and birth is dealt with incidentally.

A slave who deliberately kills, or who deliberately strikes so as to kill, his master incurs the penalty of the slow process. A slave who accidentally kills his master incurs strangulation subject to revision. A slave should, moreover, be sparing in his corporal attentions in regard of his master's relations to the fourth degree.

If a slave merely draws a knife on his master, the latter or any near relation of his 總麻以上, may kill the slave without any consequences (H. A. H. L. vol. XXXIX. p. 53). On the other hand, to deliberately kill a slave is visited

with strangulation; and to kill a slave of a distant relation, without actually meaning it, is visited with transportation — as is also so to kill the children of such a slave. Further in regard of the slaves of relations, it may be incidentally mentioned that the penalty for killing or striking such a slave varies with the nature and nearness of the relationship, and further the nature of the wound. So to strike the slave of a relation in the third or fourth degree, occasioning injury more serious than a cutting wound, entails two degrees less than the ordinary penalty: and to strike the slave of a relation in the third or fourth degree, without causing a cutting wound, incurs no penalty. To deliberately kill a slave who has purchased his freedom is naturally somewhat serious, and all that the slayer can then claim is, that he, a gentleman, killed an inferior being; and this, even, cannot be claimed in respect of so killing the children of such a person — as in a case where the slain person's grandfather had been given his freedom.

A slave may not bring charges against his master, under heavy penalties (H. A. H. L. vol.

NLVIII. p. 87): and even if the charge be true, by a decree of the thirteenth year of Yung Ching — a decree never to be repealed — a slave who takes it on himself to denounce his master is to be severely dealt with, as the law directs 仍照例重治其罪 (H. A. H. L. vol. NLVIII. p. 86). If a slave has been set free, before he brings the charge, he will still be liable to punishment — though in a less degree: and even the children of such a person to the third generation owe duty to their master.

As regards the duration of the tie; if a slave be sold, he becomes a stranger in his former master's house, but, if he becomes a freeman, either by redeeming his liberty, or by being given it, his relations to his old lord will continue — and so he may not strike him, or flirt with his wife; and if the tables are turned, his old master will get the benefit of the statute.

A slave's wife follows her husband's *status* if she lives with him in his master's house, but not if she makes her living outside (P. A. S. P. vol. XXII. p. 5). Thus, in a case where the wife of a convict slave was killed by the slave's

mistress, the wife having for some years lived with the convict in the house of the bannerman to whom he had been assigned. For this the lady was sentenced to the equivalent of two year's transportation — *i. e.* one hundred cuts with a whip, redeemable, as she was a woman, by a fine.

WET-NURSE AND CHILD

It is desirable to append a few words on this — an artificial relation of an entirely one-sided nature. By the old law, if a wet-nurse overlaid her child and killed it, she was simply sentenced to penal servitude; but as it was found that the women had a way of doing so intentionally, in order to free themselves to undertake a second affair, it was made lingering death, if the child was killed intentionally, and strangulation if done unintentionally. The sentence was not, however, of necessity carried out; but by 55. Ch'ien Lung — Edict — it was decreed that if the child was an only one, though the death was caused accidentally, the nurse's name should be included among those whose sentence merited being

carried out: if the child was not an only one, the sentence should in due course be commuted, and would amount to a term of imprisonment and fine (H. A. H. L. vol. XXXIX. p. 72). It is essential that the woman should have been hired to nurse the child for the relation to hold (H. A. H. L. vol. XXXIX. p. 69). Nor is it only in killing cases that the nurse will suffer severely — as she will find to her cost if the child be injured ever so slightly.

PART III

— CHAPTER —

SPECIFIC OFFENCES

INTRODUCTORY

DIVISION OF OFFENDERS AND OFFENCES

Offenders are of two chief classes, 'ordinary offenders' 常犯, or those guilty of offences against the Individual, and 'official offenders' 官犯, or those guilty of offences against the State.

As regards the Chinese division of offences, ten heinous offences styled the Ten Felonies 十惡 are distinguished by the law from other offences by reason of their extreme gravity. These are the two treasonable offences of rebellion and disloyalty, together with sedition, parricide etc., murder of three or more of a family etc., sacrilege, impiety, discord, incest, insubordination. These and all other offences are treated under

the appropriate clause in the Code — *e. g.* treason, sacrilege, rebellion, highway robbery, robbing in open day, murder, killing an adulterer, assault between those on an equal footing and in general, unlawful and false imprisonment etc. etc. Inasmuch, however, as many strict offences against the State are in reality merely ordinary offences subject to certain special considerations; and further, inasmuch as beyond the Ten Felonies there are considerations of aggravation which may render other offences equally severely punishable therewith; and lastly, inasmuch as the arrangement of offences in the Code, however lucid originally, has suffered somewhat from age and constant additions to clauses by strained and perhaps somewhat irrelevant interpretations — an arrangement not unfamiliar to an English reader has been adopted.

CHAPTER VI

OFFENCES AGAINST THE PERSON — HOMICIDE

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

De Quincey has the credit of originating the idea that murder is one of the fine arts, and advocating its practice as the most pleasurable of pursuits; but we have to turn to Chinese law to fully appreciate the infinite variety of which the crime is capable, and the nice distinctions that can be drawn between the different kinds of killing — withal, most erratically classified. The subject is vast. In starting, the word *sha* 殺, to kill, is extremely comprehensive. Doing anything sufficient to cause the death of another is termed killing him. Thus, it is killing a man if he dies from his wounds, or is drowned running away from another, or falls down and gets a mortal hurt struggling with another, or where one forces another to commit suicide. And between the

various kinds of killing the most careful distinctions are drawn. There is killing with malice afore-thought, killing with intent, killing in the course of a fight, killing a man intending to kill someone else, killing a man in larking with him, killing a man by accident, killing a man in self-defence — and volumes might indeed have been written in regard of each. Then there is killing a trespasser — distinction being drawn as to the nature of the trespass: killing a person who enters one's house by night without just cause, or who commits robbery in the said house by day: killing a highway robber, or a person who commits a robbery in one's field by day or by night. Again distinction is drawn between killing a robber in the house, or in pursuit, or after he has been knocked down, or after he has been captured; and whether or not the robber offered resistance is also matter for consideration. Then there is the varying gravity of the offence depending on the relationship of the person killed. Thus there is the awful crime of killing one's parents, or one's grandparents, or one's mother-in-law or her husband: and the lesser but still heinous offence

of killing one's uncle, or aunt, or elder brother, or any of one's seniors: and the comparatively mild offence of killing one's wife or younger brother: and, what in many cases is no offence at all — the killing of one's children or grandchildren, their wives, etc. Then, again, in another class, the crime changes with the respective position, or artificial relationship, of the parties. Thus, there is killing a policeman, or a commanding officer, or a magistrate, or a master, or a tutor, etc.: and, conversely, there is the killing of a person by one who has been sent to arrest him, in the act of arresting him, or after he has been arrested: the killing of soldiers by one in command: the killing of offenders by the person trying them — and here it is important to determine whether the offenders were really guilty of a capital crime, and whether the case was tried according to law. Furthermore distinction is drawn as to the manner of killing. Thus the dead person may have been stripped and left to die from exposure; or he may have been kicked in the stomach; or, perchance, beaten to death with a broom handle, or a hammer, or a

stool. Perhaps strangulation may have been adopted — and this either with the hands, or with a rope, or with a convenient sash. Perhaps the eyes have been gouged out, or the fatal damage has been done with the talons — in the peculiar Chinese mode. Perhaps a chopper or other domestic implement has been requisitioned. Curious to say, to stab or chop a man to death is not so serious as to gouge out the eyes with mortal effect. To shoot the victim is not uncommon (the law however discouraging the use of firearms), nor is poisoning (as to which there are special laws), nor is burning to death (arson being an aggravation). To bite a person to death is considered a mild form of murder; and to bury a man alive is not regarded with the most extreme disapproval — for indeed it was originally devised as a method of disposing of a person, without actually incurring the responsibility of taking his life, though latterly the law has regarded it as killing. Then there is indirect killing. The victim may have been dunned 索討 to death by the continual presentation of a small account; he may have

been rolled into the river: he may have been accidentally pushed into a pond out of which the pusher refrains from helping him.

In conclusion, however, though there are all these divisions, sub-divisions and distinctions in the offence, he who turns to the exposition of the Chinese law of homicide, as it is set forth in the Code, will be singularly disappointed — for the exposition therein is not remarkably full, and the classification is simply misleading. The truth is, that in this matter, as in other considerations of Chinese Law, concentration — in our sense — has not been attempted; relationship has been, on the whole, too powerful a force; and considerations of homicide — independently of the small area set apart for them — appear first in one section, and then in another, throughout the Code.

Killing several of a family. — There is also another consideration, which arises when two or more persons of the same family are killed. This, as the reader has already gathered, is one of the most serious of offences — and much more so than killing the same, or even a greater, number of individuals not related to one another.

In the case of killing two or more persons not related to one another, each offence is properly dealt with separately, and the offender tried for one only; but to kill two or more persons of the same family is dealt with as one offence (H. A. H. L. vol. XLIV. p. 59). So if a person kill three members of the same family, the slayer himself will suffer the lingering death, his property will be confiscated, and the wife and children involved in the offence. It is essential that the persons killed should be on the same footing as the slayer 平人殺平人, and if one of the victims was a man who might justifiably, or ought to be killed, the law does not apply. Such might occur in a fray, where the prisoner first killed one member of a family, and then chanced to kill another; as in the case of Chang Yüan-shih 張元士, where the prisoner was tried for killing a father and his son — the first being killed by the prisoner in rescuing a step-mother, and the second in his own personal self-defence. The Board held that the prisoner should be sentenced on the latter count only (H. A. H. L. vol. XLIV. p. 97).

The question is occasionally one of great delicacy and nicety. For instance in a case where the persons killed were a husband and his wife (a naughty woman), and the latter was killed first, the slayer was adjudged decapitation, exposure of the head, and forfeiture of half his property: on the other hand had the slayer used some discretion, and slain the parties in the reverse order, he would have been merely decapitated — for under these circumstances the woman would have been a criminal (H. A. H. L. vol. XXVIII. p. 13).

If the parties on both sides are equally worthy to be killed, and so on the same footing, the law of course applies, but decapitation only inflicted on the slayer.

If the offence of the persons killed was due to the slayer, lingering death will be inflicted on the slayer — but his property will not be confiscated, nor his family involved. So in the case of Wei Lao-han 韋老漢, who killed an old woman with the aid of the latter's relatives; the object being to extort money from a third party, by depositing the corpse upon the said

party's property — the whole matter being arranged by Wei. The affair being satisfactorily accomplished, and the money duly extorted, the prisoner saw fit to appropriate the money himself. To this the confederates raised many objections, and even threatened the prisoner; whereupon the latter, with the aid of his sons, straightway killed his associates, to stop their mouths 滅口. The prisoner was sentenced to lingering death without more, and the sons of the prisoner, for killing persons whom they had no business to kill 究非該犯等所應致斃 — though persons, as the Board remarked, deserving of death — were sentenced, as accessories, to strangulation subject to the Autumnal Revision.

It is noteworthy that distinction has been drawn in this class of cases between one who premeditatedly or deliberately commits homicide, and one who does so merely in trying to escape arrest — some mitigation being allowed in the latter case; as in an instance wherein the offender killed three of a family who sought to arrest him for stealing; confiscation of his property being

remitted, as also the liability of his family for his offence.

The relations that are within the meaning of the statute are held to be, all those within the five degrees of relationship, all relations living together and holding property in common, all members of a household, servants, and slaves. Two partners in business 同夥營生 may also be so considered (H. A. H. L. vol. XXVIII. p. 1). On the other hand, members of the same clan merely, who do not live together — and though bearing the same name — are not so considered, save under exceptional conditions. So in the case of an adulterer who killed three such persons in trying to escape, and became thereby legally liable to strangulation simply. Held by the Board that strangulation was inadequate, and that instant decapitation be adjudged.

Limit of Time. — Where death occurs not at the time of, but subsequently to, an injury, certain limits of time have been fixed for the purpose of regulating the responsibility of the doer of the injury — both as touching the penalty,

and the time during which medical aid must be provided. The limits differ according to the nature of the injury, the manner in which inflicted, the subsequent cause of death, the class of offence in the first instance, and the chronic consideration of relationship.

Firstly, in the case of an injury of itself the direct cause of death, and without consideration of relationship. The limit where the wound was inflicted with a stick, or the hands, or feet, or any non-lethal weapon, is twenty days: if with a cutting instrument, thirty days: and, in either case, if a bone be broken, or the victim be a woman or a child, fifty days. Again, if within a *further* limit of ten days, in ordinary cases, or twenty days, if a bone be broken, the wound proves fatal, the offender will still be held responsible, and sentenced capitally, but will be recommended to mercy. It is to be noted, that if a soldier wounds a man with the handle or back of his sword, it is not considered wounding with a cutting instrument (*cf.* case of Lu Ku 魯固 P. A. S. P. vol. XIX. p. 19, where the wound was inflicted with the back of a chopper).

Where the death occurred not from the very injury itself, but from disease supervening on the injury, the above limits of time regulate the responsibility, but the punishment varies according as the wound was in the first instance serious or trifling. So, if the wound be serious or ordinarily dangerous, the capital sentence will be imposed — apparently irrespective of the victim's contributory carelessness; as in the case of Liang Ming-an 梁明安, wherein the deceased had been wounded in the throat, but was recovering, when carelessly washing his face, he caught cold, and, inflammation supervening, died (P. A. S. P. vol. XIX. p. 14). On the other hand, if the wound be trifling, servitude for life will be the penalty — and this, again, apparently irrespective of the victim's own carelessness. So a man had a tussle with a cousin, and therein received a slight wound in the foot by stumbling over a tile; the sufferer washing his hurt — an extremely careless thing to do, the report remarks — erysipelas set in with fatal effect. For this the cousin was held responsible, and sentenced to servitude for life

three thousand *li* from his native place (P. A. S. P. vol. XI. p. 46). Where the injury was serious, but the cause of death was not disease, but merely bedsores, the penalty of transportation for life has been adjudged (cf. case of Ho Kuo-êrh 郝闊兒 H. A. H. L. vol. II. p. 57).

Where the prescribed limit of time has been exceeded, even if the death followed directly from the wound, the offender will ordinarily only be punished for wounding (cf. case of Shih Li 師禮 P. A. S. P. vol. XIX. p. 24). But not so where the circumstances were such as to point to deliberate murder, or where the injuries were inflicted by a robber or a ravisher in resisting arrest (H. A. H. L. vol. XXXVII. p. 65).

Where relationship operates, the limit of time is subordinated to the nature and degree of the relationship — the responsibility is apparently a continuing one, and the efficacy of the time limit is its effect on the penalty. If the relationship be near, and death occur within the prescribed limit, the penalty is heavy. So in the case of Chu Hua-nien 朱華年 the victim was a first and senior cousin, and the penalty a commuted

sentence of decapitation subject to the Autumn Revision (H. A. H. L. vol. XLI. p. 38). The circumstances were that the offender asked his cousin to repay him a debt; the cousin thereon abused the offender, struck him, and even butted him in the stomach. In his efforts, the cousin knocked his head against an earthenware teapot the prisoner was carrying, and hurt himself — though not seriously. Catching cold, however, in the wound, he died twenty-one days afterwards. In this case, on the one side, was senior relationship of near degree, but, on the other, as extenuation, undoubted provocation and accident — hence the commutation. If the relationship be more remote, and the period exceeded, the penalty is lighter — usually servitude or transportation. Two edicts of the twenty-third and thirty-first year of Ch'ien Lung provided that if the relationship be only of the fourth degree, if death occur beyond the limit, the offender should be sentenced to servitude for life in a penal settlement; as in the case of Ping T'ien-ming 芮天明, wherein the offender bit his third cousin's thumb, which subsequently festered, and caused death

(P. A. S. P. vol. XIX. p. 20). And in the case of Li Ho 李和, where a remote senior was the victim, transportation was adjudged (H. A. H. L. vol. XLI. p. 38).

Effect of using Fire-arms. — So great is the objection to fire-arms, that in cases where persons are shot unintentionally, mitigation which would be allowed in other cases, is not only denied, but the offender will most generally be sentenced to decapitation — and not simply to strangulation. The only cases where mitigation is allowed, is where a person is carrying a gun, and it goes off consequent on his being struck or falling as he runs away. Thus, in the case of Chêng Yü-tsai 鄭雨崽, the mitigation to strangulation was disallowed, although it was admitted that the offender had no intention of firing the gun — which exploded as he was using it to ward off a blow from a hoe (H. A. H. L. vol. XLIV. p. 87). And in the case of Wang Tzŭ-ch'ing 王子磬, no representation was allowed to be made in the offender's favour, although it was admitted that the gun went off by accident, while he was prodding a man who was assailing

his father with it, and that he would under ordinary circumstances have had his sentence commuted as of course (H. A. H. L. vol. XLIV. p. 88). And so again in the case of Chang Shêng-hsiang 張勝享, wherein a man shot another who had got his mother down in a wet paddy field — although it was admitted that the old lady was in danger of her life, and that the offender fired the shot under stress of circumstances which would otherwise have secured acquittal. In consequence of this latter case, the law on the point was clearly laid down in a decree, in which His Majesty said that in all cases where a person shoots another, excepting only where the gun explodes consequent upon the aforesaid person being struck or falling in running away, the homicide shall be treated as intentional, and the sentence must be that prescribed by law — decapitation subject to revision: nay more, the offender's name may not be entered upon the list of Cases Reserved, and the only grace possible may be that His Majesty may not for the usual three years tick off the name for execution, and at the end of

that period, the case may be considered, and the sentence *may* be commuted (H. A. H. L. vol. XLIV. p. 84).

SECTION II — JUSTIFIABLE HOMICIDE

JUSTIFIABLE HOMICIDE

The question commonly arises where one person kills another committing an offence, and furthermore by reason of the relative position of the parties — and firstly as to the former.

As regards robbery etc., if a robber enters a house at *night*, and the owner thereof kills him on the spot, it is no offence: nor is it if the robber be armed and resist arrest putting the said house-owner in peril: nor is it blameworthy to kill the robber (if he be armed) in warding off a blow. Again it is a comparatively light offence, punishable with one hundred blows and three years transportation, for a house-owner to kill a robber who enters his house during the

daytime, or robs his *yard* during the night (and this whether the robber is still on the premises or not). In no case, however, must a person keep on beating a robber (who dies therefrom), after he has been knocked down, or has been captured, or after the aforesaid person has had time to collect his senses, and the robber makes no resistance (H. A. H. L. vol. XXI. pp. 70—2); and though there may be reason to believe that the fatal blow was given before the man was knocked down, it is always to be considered a grave offence, where a person being in a position to hand over a robber to the police, dispenses summary justice on his own account (H. A. H. L. vol. XXI. p. 62); and to invoke others to do so, in no way diminishes the gravity of the offence. It is not a capital offence, if the fatal blow was given before the thief was *hors de combat* (H. A. H. L. vol. XXI. p. 63).

It is not justifiable to kill a person who is robbing one's field by *day* — on the contrary, it is punishable capitally. Thus it is unjustifiable for the owner to kill one who is robbing his standing crops by day (and this whether there

is anyone on the look out or not), and the case will be considered one of unauthorised killing an offender 擅殺罪人 (H. A. H. L. vol. XXI. p. 64). Unauthorised killing is however less serious than to kill without any business 究非應致斃.

To kill a person who is robbing one's field by *night*, if done on the spot, is in a measure justifiable however; as in the case of Wèng Liu-kou 翁六狗, who was acquitted of the capital charge, and simply sentenced to transportation, for knocking down and killing a person he caught taking a pear outside his wall (H. A. H. L. vol. XXI. p. 71).

It is quite justifiable to kill a robber in self-defence. But it must be in self-defence. So in a case where some robbers, pretending that the owner of the house was a thief, raised a hue and cry — and the owner meeting them with a spear, killed one and wounded another. This was not self-defence. And again where four young fellows killed an old woman who had lost her way in the dark — taking her for one who had already robbed them and escaped.

This was not self-defence — for the young fellows were in quite sufficient force to capture the old crone, and to kill her was quite unnecessary (*v.* also P. A. S. P. vol. XXXI. p. 26). And to kill a robber who is abusive is not self-defence (P. A. S. P. vol. XXXI. p. 30) — abuse can be returned. The question also not uncommonly arises where it is sought to arrest an offender who rounds on his would be captors. If the offender be killed as a measure of self-defence, sudden and unavoidable, the killing is justifiable — but not otherwise (H. A. H. L. vol. XXI. p. 66).

It is — by way of recapitulation — laid down in general terms, that in cases of larceny and homicide, the person who kills the offender must prove that the latter resisted him and hurt him, or else the case will merely be placed on the list of Cases Reserved (H. A. H. L. vol. II. p. 22).

What has been said as regards robbers, applies also to mere trespassers. If a person enters a house in the night, and the master thereof, in his flurry, shoots him, it will be considered justifiable: and even if the master shoots the trespasser after he has had time to think, the act will be considered in a measure justifiable —

the penalty to be as before : but it is punishable as killing with intent if the master first deliberates, then threatens the use of fire-arms, and in the interval the gun accidentally goes off — as in the case of Ku Ssu-ts'ai 古思才 (H. A. H. L. vol. XXX. p. 48). And the above rules extend also to lunatics (H. A. H. L. vol. XXI. p. 45) — but only if they actually have improper designs, and not merely because the slayer was under the impression that they had them (H. A. H. L. vol. XXI. p. 46). A person other than the master will be sentenced to strangulation subject to revision for killing a trespasser.

It is justifiable to resist with fatal effect acts endangering the property of the person resisting — as, *e. g.*, the breaking of a dyke (see also later).

If a band of men attack a house and set fire to the out-buildings, it is practically justifiable for the master to cut down a fellow in the act — the penalty being one hundred blows only. And to kill such a ruffian in self-defence is justifiable (*v.* case of Hsi Ta-kuo 奚達國, P. A. S. P. vol. XXXI. p. 19).

To kill a smuggler in truth engaged in the

exercise of his profession is not exactly justifiable, but nearly so — being regarded as killing an offender without due warrant. If the man was not in fact smuggling, the act would be in no measure justifiable.

To kill a person engaged in committing an act detrimental to the community at large, or to the State as representing the community, is justifiable. So in a case where a person attempted to prevent a dyke being broken down by firing at the scoundrels doing it. He failed to prevent them, and the dyke was cut — with the consequence of the whole country side being flooded and four lives lost. He had however killed two men, and as killing with fire-arms — whether intentional or not — is looked upon as intentional homicide, the slayer was sentenced to decapitation, but on special representation was granted a free pardon.

It is justifiable in a measure to kill a person who is desecrating the grave of the slayer's father.

A very large number of cases of justifiable homicide arise in connection with impropriety. Mitigation is allowed as of course where the

homicide took place during the course of resisting an attempt on virtue. In the case of a virgin, the killing would be considered justifiable; in the case of a naughty woman who has repented her sins partially so only — she being sentenced to one hundred blows and a fine. If, however, the woman refused the advances of her old lover simply because his purse was exhausted, or because she had taken a fancy to some-one else — then, if she killed him, she will be guilty of murder in the first, second, or third degree, according to circumstances. And so with a more disgusting offence, if a youth, whose chastity is threatened, kills a would-be ravisher ten years older than himself, he will practically be justified — that is will receive a capital penalty commutable as of course by steps to fine. But the other must be ten years older, and the youth must be an innocent. So in the case of Sun Shuang-hsi 孫雙喜, wherein a boy resisting his attacker, stabbed the latter with his own knife, which the little fellow had wrested from him. The ruffian died, but as the boy had been naughty on a previous occasion, with perfect

self-approval, the Board insisted upon a capital sentence being carried out (P. A. S. P. App. III).

Secondly as to justifiable homicide arising out of relationship (*v.* also *Relationship*).

Careful as the Chinese are of human life, they will not hold a parent capitally liable for the murder of his offspring: on the contrary, the action is regarded as justifiable homicide — *i. e.*, completely justifiable in some cases, partially so only in others. So in the case of T'ien Hung-lin 田紅淋, who burned alive his son and two grandchildren, and who being sentenced to death for the destruction of one child only, was finally let off with sixty blows and one year's hard labour — although the killing was brought in as with intent (H. A. H. L. vol. XII. p. 3). And a brute who beat to death a blind girl that he had adopted, because she would not learn to sing, escaped with ninety blows and two years — and this although as she had only lived with him two months, it was dealt with as a case of beating a servant to death (H. A. H. L. vol. XII. p. 2).

In the case of Ho Chin-li 何進禮, a father

strangled his daughter, aged nine, for illicit behaviour in a stable with a boy aged fifteen. Some one else, and not the father, detected the culprits — but the retribution was considered comparatively justified, and the father sentenced to one hundred blows (H. A. H. L. vol. LII. p. 8).

In another case, a mother was held perfectly justified in beating her son to death, because in defending himself from his father who had attacked him with a club, he had happened to kill his parent — the act being considered to fall under the statute that a parent is not to be called to account for killing his offspring, if they venture to strike him (H. A. H. L. Supp. vol. XII. p. 2). And an uncle who beat to death a nephew once removed, for tearing up the portrait of his great-grandfather, and pitching his bust into the dust heap, was only given one hundred blows.

A parent who accidentally kills his child incurs no penalty (*id.*).

In the protection of a child's life, a parent is considered partially justified, and mitigation allowed him according to the nature of the attempt upon the child. Thus, if the killing be consequent on

an assault, the death penalty will be commuted to one hundred blows and transportation for life to a distance of 3000 *li*: if consequent on a deliberate attempt to murder, the death penalty will be commuted to military servitude on the frontiers — and if in such case two of a family are killed, to servitude in the desert, and if over two of the same family, to strangulation execution deferred. If the person killed be a relative, the sentence will be commuted, or not, as the case may be, according as he was a senior or a junior of the slayer's family (H. A. H. L. vol. XXXII. p. 2). If the killing be consequent on an attack on the propriety of the child, the parent will be *sentenced* to strangulation (H. A. H. L. vol. VIII. p. 28).

In the protection of a child's propriety, a parent may justifiably kill, subject to the circumstances of the case: but it is not entirely justifiable to kill the mere abductor of your favourite daughter, though by night, and the villain was knocked on the head in a scrimmage (H. A. H. L. vol. IX. p. 10): and a parent may not kill one who makes improper advances to his children, whether

at the time, or afterwards, although the sentence of death will, as a matter of course, be commuted (H. A. H. L. vol. VIII. p. 28).

As regards the protection of parents by their children. It is completely justifiable for a child to kill the murderer of his parents, if the killing take place then and there, and as a result of natural and proper anger, necessarily arising from the attack upon them, or in their actual defence — and this though the murdered party be a relation, for the law recognises natural feelings. As regards the killing of a would-be murderer in defence of the parents, the child is considered partially justified (subject to the limitations noted below), in that the capital sentence is commuted to transportation for life. To be so partially justified, the parent's life must have been actually in danger, or the son must have had reasonable ground for thinking so, and the fatal act must have been done on the spur of the moment. So, if in running to the rescue of his parents, a son chances in his haste to slay the assailant, he may plead that they were in danger of injury to life or limb, and when the capital sentence is

presented for revision, note will be made that the offender is entitled to have the sentence commuted to transportation for life.

As regards what is sufficient justification for interference, the two cases of Ts'ai Ch'uan-chi 蔡傳奇 and Wang Hua-yi 王化一 are in point; in the former the parent was on the ground, and calling out lustily for help, and it appeared, furthermore, that the man killed had his fist raised to hit her — held, sufficient justification: in the latter case the supposed endangered parent had not even asked for help, being of opinion that he was quite equal to the assailant — held, no justification. It would seem that there must be battery threatened (H. A. H. L. vol. XLIV. p. 80).

Moreover the connection between cause and effect must be very evident and direct. So in the case of Ho Pên-ju 賀本儒, the deceased had first attempted to seduce the slayer's mother, and had subsequently attacked her, but on its being shown that the slayer had merely abused the deceased for insulting his mother, and that the fatal blow had been struck after the deceased

had let her go, and during the fight that ensued thereon, the offender was held rightly sentenced to death (H. A. H. L. vol. XLV. p. 9).

On the other hand, provided there be satisfactory and direct cause for interference, considerable latitude will be allowed the son as to the manner thereof; as in the case of Lung Shao-tsung 龍紹宗, wherein the man killed was beating the parent at the time — and the son used a knife (H. A. H. L. vol. XLIV. p. 79); and in the case of Mrs Ch'ao *né* Ch'ao 趙趙氏, wherein the son inflicted other wounds (though not fatal ones) upon the attacker after the latter had been knocked down (H. A. H. L. vol. XLIV. p. 78). And even where the person killed was not the man who had inflicted the injuries which excited the apprehension of the slayer — the latter, if he has used a knife, a pair of scissors, a hoe, or a rolling-pin, will be partially justified: but if a sword or a spear has been used military servitude will be imposed instead of transportation (H. A. H. L. vol. XLIV. p. 74 *et seq.*): and if fire-arms, no allowance whatever will be made (H. A. H. L. vol. XLIV. p. 81) — a provision,

it may be remarked, extending to all cases of self-defence, save those where the attacking party is similarly armed.

And partial justification to some extent may be allowed also where two of a family have been killed — the capital sentence being subjected to revision (H. A. H. L. vol. XLIV. p. 54).

On the other hand, it is not considered partially justifiable to kill in a parent's defence where the father was in no danger; as in the case of Hsü Lung-tê 徐隴得, convicted of wounding with a lethal weapon, though in defence of his father — it being held that the assailant was merely pulling the father about (H. A. H. L. vol. XLIV. p. 76). Again, in another instance, a son tripped up an assailant, declaring that he purposed tying him up and handing him over to the authorities — but, by tripping the fellow up, he killed him, and on trial therefor it was held that he was not justified in thinking his father's life in danger, and no mitigation could be allowed (H. A. H. L. vol. XLIV. p. 81). Nor is it partially justifiable, if the slayer be a party to the fray (H. A. H. L. vol. XLIV. p.

52). Nor is it partially justifiable to kill the assailant after he has been disarmed; as in the two cases of Ho Ho-shang 郝和尚, and Kuo Ch'i-feng 郭起俸, wherein there was no question but that the two criminals had interfered to rescue their parents, but it appeared that they had killed their opponents' with a stool and a rolling-pin respectively after the said implements had been wrested from them (H. A. H. L. vol. XLIV. p. 75).

Moreover, the position of the assailant, and his condition physical and mental, are exceptional considerations, counteracting any justification; as in the case of Jên Tzu-wang 任子王, wherein it was held to be unjustifiable to kill a drunken creditor who tried with the utmost violence to take liberties with the slayer's mother (P. A. S. P. vol. XXX. p. 41).

Nor (contrary to the case of an actual murderer) if the slain assailant was a relation, will the ordinary rules apply. If the relationship be distant, the act will be comparatively justifiable; if the relationship be near the act will (practically) be in no measure justifiable. So, if the slain assailant

was an uncle, the only mitigation possible is that representation may be made to His Imperial Majesty, by virtue of which (if His Majesty sees fit) the execution may be postponed.

Next with the relation of husband and wife. A husband may (practically) justifiably kill his adulterous wife on the spot, if he catch her *in flagrante delicto* — escaping with eighty blows: and the lover will be held capitally liable. But, if (notwithstanding that she is caught in the act) the husband kills her days after, and though there be proof to support him, he will be sentenced to three years transportation — Don Juan receiving the same. If however the delay was merely due to the wife's escaping from her justly irate husband, the latter will be more or less justified, receiving one hundred blows only — and Don Juan will be sentenced to transportation for life. As for the lover, it appears that the husband may also justifiably kill him, escaping even a flogging, if he do so on the spot, and at the time 姦所登時殺死者勿論 (H. A. H. L. vol. XXV. p. 16). And if the husband, following the offender, kills

him after he gets away, it is practically justifiable — a flogging merely 如姦夫已離姦所本夫登時逐至門外殺之者科以不應重杖 (*id.*). And if the husband, catching him in the act, kills him next day, or sometime afterwards, the penalty is one hundred blows and three years' transportation 於姦所獲姦非登時而殺者依夜無故入人家已就拘執而擅殺律杖一百徒三年 (*id.*). But if the husband did not catch him on the spot and at the time, and kills him next day, or sometime afterwards, it is killing a trespasser without authority, and the husband will be sentenced to strangulation, subject always to revision 殺死又非登時照擅殺罪人律擬絞監候 (*id.*). If the husband, without killing the adulterer, merely breaks every bone in his body, he will escape the penalty in the second case given, and in the third and fourth cases, receive a reduced penalty.

Relatives may justifiably assist the offended husband on the spot and at the time.

On the construction of this latter phrase points frequently arise. So in a case where a lover

was tied up first, and subsequently, because he became abusive, his eye was gouged out. Here, the Governor was of opinion that this was not a case for justification; but the Board on the ground that there had been no break in the intentions of the husband, insisted to the contrary. And in the case of Ching Chiu Kuei Wa 景九貴娃, it was laid down that tying the man up after the fatal injuries had been inflicted did not affect the point (though possibly he would not have died had his hurts been attended to — H. A. H. L. vol. XXV. p. 59). In the case of Ou Mei-ch'èng 歐美成, although more than twelve hours had elapsed between the discovery and the killing, the Board yet considered the latter had been done on the spot: — *i. e.* inasmuch as the husband caught the man under the bed in the first instance, and although it took him all night to catch his wife, tie her up, take her to her lover's house, tie him up too, and throw the pair into the river, it appeared that he had never swerved from his idea of killing them in his righteous wrath (H. A. H. L. vol. XXV. p. 1). And, in the case

of Fèng Chi-yüan 馮吉沅, the Board held that it was clearly a case on the spot etc., although the man did not kill his wife until he came back from chasing her lover (H. A. H. L. vol. XXV. p. 2). On the other hand, it is held that if the avenger does not kill the wife when he first discovers her misconduct and only does so when he catches her repeating her offence, his act will not be justifiable (H. A. H. L. vol. XXV. p. 3). Moreover, if the husband after a sojourn abroad, returns and finds his wife *cuccinte*, and indignant thereat kills her, he will not be entirely justified — his finding her in such a condition was only tantamount to hearing that she had misbehaved herself (H. A. H. L. vol. XXV. p. 6).

It is not justifiable to kill a wife merely on her forced confession, and without actual proof of the adultery.

Of course, if a husband has been a party to his own dishonour, his act will not be under any circumstances considered justifiable (H. A. H. L. vol. XXVI. p. 1); and he cannot justifiably kill an innocent bystander who interferes to prevent

him from satisfying his revenge (H. A. H. L. vol. XXVI. p. 9) — though if a policeman who knows the circumstances interferes and is killed in consequence, the act is indeed not justifiable (being on the contrary ordinary homicide), but the aggravation that the person killed was an official will not be taken into consideration (H. A. H. L. vol. XXVI. p. 10).

If a wife procure the dishonour of her daughter, and her husband kills her in his righteous indignation **激於義忿** he will not be held capitally liable, but only sentenced to a short term of banishment — *v.* case of Wu Wu **吳五** (H. A. H. L. vol. XXVI. p. 3); but *c. f.* the position where it be the mother-in-law who is killed — though, as in the case of Jên Hsiao-ch'in **任學秦**, she had not only procured the wife's dishonour, but was actually forcibly restraining the husband from avenging his wrong (H. A. H. L. vol. XXVI. p. 11).

It does not appear that a husband is justified in killing a friend who desires to know more of his wife, and who offers to punch the husband's head when he objects (case of Wang Ch'i-shan **王起山** P. A. S. P. vol. XXX. p. 47). The

husband would be justified, however, in so doing if the friend had a knife in his hand, and puts the husband in fear thereby. And most certainly a husband will not be held justified if he *poisons* an innocent person, in the attempt to get rid of his wife's lover.

A wife who kills anyone in defence of her husband will receive some mitigation of the capital sentence (H. A. H. L. vol. XL. p. 62). Seemingly the case would be considered partially justifiable, and the rules applicable would be those guiding the Court in the case of a son under similar circumstances.

And as regards homicide by relations generally, questions of justification commonly arise where the killing took place in a relative's defence. To kill in a relative's defence one who has assaulted him with deadly intent is limitedly justifiable, and subject to the special considerations of the case. But the case must be a clear one, and instances are on record where it has been held in no measure justifiable to kill in defence of an elder brother. The majority of cases, however, as usual arise in connection with

the defence of a relative's propriety merely. So, it is in a measure justifiable to kill a person who attempts to seduce a relative, either in her defence, or if the offender (alarmed by the interference) turns on the new comer, in his own: but, in order to plead the statute, the slayer must kill the offender in trying to arrest him, and not in a mere fight arising out of vituperation (H. A. H. L. Supp. vol. VIII. p. 29). To be justified in thus interfering, however, the relationship must be near, and so in the case of Ch'iao Hsi-ch'uang 喬喜壯, a man who, on hearing his distant cousin call out in the middle of the night, killed her would-be seducer in the darkness, was held to be not sufficiently nearly related to have a right to interfere (*id.*). A merely intimate friend (even though placed in charge of the girl by her parents) cannot justifiably kill a would-be seducer (H. A. H. L. vol. IX. p. 17). On the other hand, where the homicide is committed by a female relative of near degree, the law is inclined to be tender — assuming there is fair ground for the act. So in the case of M^{rs} Chuang 莊氏, who, in pursuit of the lover of her

daughter-in-law, killed his mother who threw herself in the way to protect her son. It appeared that the mother knew of, and encouraged, her son's naughtiness, and the capital sentence was reduced to transportation commutable by fine (H. A. H. L. vol. XXVI. p. 11). Moreover, even where the relationship was remote, if the interfering party did not kill directly, but was the indirect cause of death, the killing will be considered partially justifiable. So in a case where a distant relative had a scrimmage with an abductor, and the latter, getting the worst of it, ran away, and tumbling over a dyke, injured himself so seriously that he died a few days afterwards. Held, that the slayer should be sentenced to ninety blows and transportation for two and a half years'.

And so furthermore with certain artificial relationships. A master who stabbed, but did not kill, a ruffian who had tried to ravish his pupil, was held justified, on the ground that he did it in his righteous anger: some thoughtful friends who, in attempting to arrest the aforesaid offender, succeeded in despatching him, were

sentenced merely to modified banishment. Homicide committed by a servant in defence of his employer's house and property is justifiable — but he must not take more upon himself. So in the case of Huang Yung-tsai 黃泳在, who killed his mistress' lover in the middle of the night, under the impression that he was a thief. It was held that if the fellow had been a thief, Huang might justifiably have killed him then and there, but he was not the guardian of his mistress' honour — which, incidentally, she had previously sacrificed (H. A. H. L. Supp. vol. VIII. p. 29). On the other hand a servant who makes up to his mistress may, in some measure, be justifiably killed by the irate husband (H. A. H. L. Supp. vol. VIII. p. 30). In conclusion an example of the official relation. A constable, armed with a warrant and in self-defence, is practically justified in killing an offender who resists him, provided the killing be unintentional and in the act of arrest.

SECTION III — EXCUSABLE HOMICIDE

EXCUSABLE HOMICIDE

By far the most important class of this is that described in English law books as *per infortunium*, or homicide by accident or misadventure. Homicide in self-defence is also a common form; but what we call excusable homicide in defence of a child, wife, parent &c., is, in China, merely an effect of relationship, and a form of justifiable homicide — excusable is too weak a term.

Accidental. — This is primarily divided under three heads *hsi sha* 戲殺, *wu sha* 誤殺, and *kuo shih sha* 過矢殺 — *i. e.* killing in the course of sport, killing by mistake and killing by accident. The obvious distinction between the two latter is, that in killing by mistake, the intent to destroy life was there, but not to destroy the life taken, and in killing by accident there was no intention of taking life, and the killing occurred by chance — in neither case is *mens rea* present. An example of killing by mistake would be the attempt to kill one engaged

in robbery and killing a bystander instead. Examples of accidental killing are numerous and obvious. Examples of killing during sport occur in boxing, wrestling, fencing — football would be dangerous in China.

These distinctions of themselves are inadequate, however; for the rules which guide a Chinese Court in deciding whether a given case comes under one or other of these heads are complex: it is not enough to merely regard the intent: the weapon, the position of the parties, and the locality in which the act was done, are all points for consideration; and a case which, at first sight, would seem clearly to be excusable, when considered in the light of these other circumstances, becomes a possibly heavily punishable offence.

The subject is best dealt with by regarding the cases. And first a general rule is laid down, that for killing to be considered accidental, it must have been purely accidental and unavoidable — in the words of the law 耳目所不致思慮所不到, the use of eyes or ears could not have avoided the accident, and no care or thoughtfulness could have prevented it: 以耳

目所不及思慮所不到初無害人之意而偶致殺人, there was no design throughout of injuring anyone and it happened by chance. So, in the case of Huang Chung-chao 黃中著, wherein the plea was admitted — the prisoner trying to get away from a drunken man who desired to wrestle with him, and who being somewhat unsteady on his pins, toppled over amongst some firewood, and killed himself (P. A. S. P. vol. XVI. p. 4). And so, also, the case of Pan Pu-hsieh 班布屑, wherein the prisoner had fired a bolt from his crossbow in the dark at a fancied thief — and a companion, unexpectedly getting in the way was killed (P. A. S. P. vol. XVI. p. 1). And so again in the case of Chung Lin 仲林, wherein a person who had used all his faculties fatally injured — quite accidentally — a complaisant virgin. Chung was excused the death on payment of a fine — but was punished for his immorality (H. A. H. L. vol. LII. p. 14). So further with the oft recurring cases where a person's cattle being frightened by extraneous causes escape and do fatal injury — and if a man keeps a pet monkey

and the animal bites itself free from its cord, and kills a baby, the owner will be no more hardly treated (H. A. H. L. Supp. vol. V. p. 4). In the case of Ko Shu 革樹, the prisoner was driving a cart, and in doing so killed an old woman. He had, it appeared, called to her to get out of his way — which she not only refused to do, but actually started the bullocks, by striking one of them with a fork she held. Ko was allowed to commute the capital penalty. Equally effective was the plea in the case of Wang Ên-ch'ang 王恩長, and Ho Yün 何雲, in which a third person was killed. Wang was riding quietly along when a man by some chance startled his horse and caused it to bolt. Held, that the case should be considered as one of accidental homicide by the man who frightened the horse, and that he, and not the rider, must pay the customary fine to the relatives.

The law on the subject of accidental homicide by riders or drivers was the subject of a memorial approved in the 36th year of Ch'ien Lung. It appeared that up to that time the plea had been generally advanced, and invariably succeeded

in such cases — the driver or rider always alleging that the horse or mule had been startled, and ran away in consequence. The memorial submitted that the plea should be admitted where the driver was driving quietly, and his team was frightened by causes beyond his control; or where he was driving fast, being compelled thereto by the public service: but that the driver or rider should be held responsible, where he was driving or riding beyond the ordinary pace, without sufficient cause — though the accident occurred by the animal starting. This view was fully approved by the Board — with the comment that, if a person is riding furiously, and the horse gets startled, the result is not one that could not have been foreseen

若無故疾騁因致馬驚殺傷既非思慮所不到。

A policeman who kills a bystander by accident, in trying to arrest a thief, will be permitted to escape with the usual fine paid to the relatives of the deceased (H. A. H. L. vol. XXXII. p. 39): but not, however, if he was merely keeping

order, and wounds someone fatally (*v.* case of Lu Piao 魯標, H. A. H. L. vol. XXXII. p. 38). And in the defence of his property, a person may claim the privileges of a policeman (H. A. H. L. vol. XXXII. p. 34); as in the case of Chu Tao-ching 朱道經, who lodged in his nephew some buck-shot intended for a thief, whom he was resisting, — though relationship also played its part in this case, but would not, of itself, have been sufficiently weighty a plea to enable Chu to escape with a fine merely. A policeman is, moreover, relieved from all consequences (*scil.* after payment of the usual fine) if he chances to kill a bystander, in defending himself from assault by a thief: but the Board laid down very particularly in the case of Huang Huai-kuei 黃懷貴, that to bring the case under the statute, the man must be a police officer, and that he must be defending himself from, and not attacking a thief. In the case in question, the accused, at his neighbour's entreaty, was pursuing some thieves who had robbed the latter, and, fearing a rescue, the accused made a thrust at one of them — with the result that the

knife found a resting-place in the stomach of one of his friends. Held, that, as he was neither a police officer, nor acting in self-defence, he could not be entirely relieved of the consequences.

With the position of a policeman may be advantageously contrasted that of a soldier. For a policeman to successfully plead accidental homicide, the two concurrent conditions, (*a*) within the scope of his employment, and (*b*) the necessity of the case, are essential. But the position of a soldier is different; his primary business is not the repression of disorder, or crime; and even if he assist a hard-pressed policeman, his action will not be viewed with favour — unless, by some strange coincidence, the policeman is a relation of his. An ordinary soldier is ordinarily in the position of an ordinary person — more, a soldier in China is one of the scum of the earth, a very ruffian by nature, and, as a rule of practice, it may be safely said, if he commits homicide, every presumption will be against him. For want of ordinary care, a soldier must, of course, suffer; as in the case of Chu Chin-fèng 朱金峰, who, at a review, shot an onlooker —

the matchlock being loaded with ball instead of with blank cartridge. The statute under which the case came was held to be that providing for accidents in the Imperial Hunts 比照圍場內射獸兵丁因射獸誤傷平人致死者。

An ordinary person who, in attempting to arrest a thief, accidentally kills a bystander, is capitally liable. So, in the hard case of Chang Ssü-hui 張四會, who coming to the assistance of his servant, struggling with a thief, knocked the former on the head, instead of the latter.

As regards accidental homicide by sportsmen, until the 39th year of Ch'ien Lung, the rule was, that the capital punishment might be redeemed by fine. In the aforesaid year, consequent on the case of Huang Ch'ang-huai 黃昌懷, a new statute was passed, imposing the penalty of three years' penal servitude, in addition to a fine. In the case in question, it is to be noted that the accident was purely unavoidable. Three friends were out shooting together, and started a deer: two of the stalkers had fired and missed,

and the third, coming out of the jungle, fired his shot, just as one of the others had left his station in pursuit — and the latter, being in the line of fire, was consequently killed (P. A. S. P. vol. XVIII. p. 7). Soldiers and others, engaged in the Imperial Hunts, are excused further punishment, on payment of a fine of Tls. 10 for a soldier, and Tls. 50 for a beater (P. A. S. P. vol. XI. p. 13).

A person armed with a deadly weapon is liable for not using proper control over it, and if, regardless of circumstances, he lightly uses it, with fatal effect, he will be liable. So, in the case of Pien Liu 邊六, wherein the prisoner, who was out shooting on the high road, accidentally fired off his gun, and shot his companion. The locality where the discharge of firearms takes place is a material consideration — and so here, the spot being upon the high road (though little frequented), the prisoner was sentenced to penal servitude for life three thousand *li* from his native place (P. A. S. P. vol. XVII. p. 6) — *v.* also case of Lu Chang (*inf.*). And if, in a quarrel, a person armed with a dagger, stabs

another — not indeed with fatal intent, and only purposing some slight admonition — he will be liable for want of control over his weapon. And, under certain circumstances, a person will be liable where he has not actually used the weapon to do the fatal work, but where the weapon was within his control: as in a curious case, wherein a kindly friend attempted to stay a would-be suicide, and the latter, closing with the intervener, caused him to be pierced (with fatal effect) by a dagger that projected from the suicide's girdle.

Special rigour is shown in dealing with cases of poisoning; as in an instance where a man put arsenic between millstones, with a view to poisoning a neighbour's pigs. No pigs were poisoned, however — but some of the villagers; and when the poisoner advanced the plea of accidental homicide, it was held that, though he had indeed asked whether the meal in question was for the pigs, yet he must have known that the mill was used for many other purposes besides grinding pigs' food, and that he had not taken special precautions (H. A. H. L. vol.

XXVIII. p. 88). And it is laid down, that if a man placed poison where people pass constantly, and in exposed positions, and death result thereby, the offender will not be allowed to easily escape. Even the accidental use of poison is punishable heavily, if death result — as where, for instance, a cook mistook rat-poison for pepper, and seasoned soup therewith (H. A. H. L. vol. XXVIII. p. 89).

Apart from poisoning cases — which are, in some respect *sui generis* — what, to us, and to an ordinary jury, would seem pure accident, is visited upon the person through whom the accident happened. Thus, in the case of Wang Wu-pao 王物寶, the offender merely pushed a couple of persons, who were fighting, out on to a doorway — in fear that they would do some damage. The result was, that the pair fell over in a heap, and one of them ruptured himself, and died. The Provincial Authorities held the case to be clearly accidental homicide, but the Board reversed the judgment, and declared it to be fatal assault (H. A. H. L. vol. XXXII. p. 22). It was the same in the still harder case of Wang Chung-ts'ai 王中才, in which

all the prisoner did was to put his arms around one of two men who were quarrelling, and carry him bodily away, to prevent a fight — with the result that the man broke a blood-vessel, and died (H. A. H. L. vol. XXXII. p. 24).

Indeed, if there is any struggle at all, either with the victim, or with anyone else, the case would seem to be regarded as one of fatal assault — carrying with it the penalty of strangulation execution deferred. So in three similar cases quoted at the trial of an offender Huang T'èng 黃騰, where the accused was, in each instance, wresting a stick out of a man's hands, to prevent his beating someone else (H. A. H. L. vol. XXXII. p. 25).

Even a challenge to fight seems enough to bring a case under the head of fatal assault. So in a case where one man told another to put his child down, or he might hurt it — and the father dropping the infant hastily, the child died. The offender was held guilty of fatal assault, because he put out his hand to take the child in the first instance, and failed to catch it (H. A. H. L. vol. XXXII. p. 26).

A person may suffer, it appears, for being,

however accidentally, a remote cause of death; as in the case of Ko Shih-chiang 柯世江, who was held responsible for the death of a man, killed by a stone which had been set in motion by a person running away from the prisoner (H. A. H. L. vol. XXXII. p. 28). Nor would it seem to be greatly material, that the accident happened while the prisoner was doing a perfectly legal or even meritorious act; as in the case of Lu Chang 盧璋, who, at the request of the owner of a field, fired off his gun in the air, to frighten some robbers, and killed an onlooker.

Indeed, until the case of Chang Hsi-fa 張喜發, if, in defending himself from a blow, a person diverted it from himself to another, he would be held responsible — a clear absurdity (H. A. H. L. vol. XXXII. p. 30). In the case of T'eng Jung-k'o 鄧榮可, a man was held responsible for the death of a child, who was holding on to its father's clothes, and which tumbled down and hurt itself, during the course of an attempt on his part to forcibly induce him to vacate his premises (H. A. H. L. vol. XXXII. p. 33). And, in the case of Shih

Ch'i-ch'uan 史其傳, the prisoner was held responsible for the death of a child of an importunate dun — though it was doubtful whether the mother stumbled in trying to avoid a push on his part, or a ferocious dog which he had on the premises (H. A. H. L. vol. XXXII. p. 34 — *v.* also p. 285). Finally, the hard case of Lu Ku 魯固, wherein two men were half-seas over, and shaking the door of the room they were in, caused the door-bar to topple over upon one of them. The companion thereon tried to cut the bar adrift, and managed to knock the other on the head with the back of a chopper. The offender was sentenced to death, and a recommendation to mercy disallowed (P. A. S. P. vol. XIX. p. 17). It is to be remarked, however, that, in this case, the man was a foreigner.

On the other hand, once it has been established that the circumstances were excusable, it is of no importance that the effects of the accident were extremely serious. So in the case of Wu Ch'i-li 吳七理, the prisoner had caused the death of four persons, by setting fire to some

hay with fireworks he was letting off in honour of the gods. The wind, it appeared, had caused the accident, and the prisoner was excused with the proper fine for each life lost. And, moreover, even where the circumstances were such as to point to gross neglect, and the effects serious, the offence may be treated lightly. Thus, in the case of Ch'ên Liang-tso 陳良佐, who piled bales of goods on flooring supported by a rotten beam, and the floor, crushing through, killed a man lodging below. For this, the offender was allowed to pay a fine by way of commutation, although found guilty of killing by neglect of proper precaution 備慮不謹 — a rider being added to the effect that he had been lax in guarding against a possible danger 疎於備慮.

In conclusion, it may be added, that the penalties for killing by misadventure are formal 虛擬 only: Acts of Grace do not, in consequence, affect them, and fines paid in commutation of the penalty are, in all cases, to be exacted (dictum of Board in case of Wu Fêng-ming 武奉鳴).

The following are some important instances, showing the mode by which the Chinese jurists approach a case of the kind.

In the case of Ch'ü Hei 曲黑, the prisoner taking a gingall to examine it, dropped a spark on the priming from his pipe — in consequence of which the gun exploded, and killed a friend sitting close by. As the prisoner knew that the gun was loaded, and also that if fire was applied to it it would explode, and also that his friend was sitting only a foot's distance from him, the Board decided that this was not a case of killing by accident, neither was it a case of killing a person who could not be seen or heard 耳目不及, or in a way that could not have been anticipated 思慮不到. Nor was it a case of killing by mistake, for the prisoner did not fire off the gun intentionally. Held, that he be sentenced to transportation for life three thousand *li* from his home, and receive one hundred blows of the heavy bamboo, for letting off firearms in places where people are living 鳥鎗向有人居止宅舍施放傷人致死 (H. A. H. L. Supp. vol. IX. p. 15).

In the case of Wang Li-t'ien 王立田, the offender coming into his lodging late at night, threw a stone on the stove bed, to serve him for a pillow — and killed a friend who was lying on the bed sleeping. Inasmuch as it was pitch dark, and the deceased did not snore, it might be said that, neither his eyes, nor his ears, would have helped the offender: but, though the Court considered that there was some excuse for throwing the stone on the bed, it was held proper to award a mitigated penalty for throwing bricks about without cause where there are people living or stopping 無故向有人居止宅舍投擲磚石傷人致死, and sentenced the offender to one hundred blows and three years' transportation (*id.*). In a case, however, where persons were playing at ball, and a stranger coming behind the homicide, without his knowing it, was struck by the ball, which slipped out of the thrower's hand and flew backwards, it was held that using his eyes and his ears would not have availed the homicide, and that he could not have anticipated the result — and he therefore was allowed to compromise the case, by making

compensation to the relatives of the man killed.

In the case of Li Ju-po 李如柏, the accused was amusing himself, swinging a hammer outside another's door, and hearing someone coming behind him, and turning sharp round, he brought the hammer against the other's head, and killed him. The Court decided that Li had no business to be playing with a thing capable of causing death in a place where people were about, and sentenced him to one hundred blows and transportation for life—under the statute prohibiting throwing bricks and stones about where people are living or stopping. As, however, the offender was under age, he was allowed to commute the penalty by a fine, on paying Tls. 10 funeral expenses (H. A. H. L. Supp. vol. IX. p. 16).

In the case of Hu Wèn-ch'èng 胡穩成, a man had loaded his matchlock to shoot a bird, but the bird flying away as the sportsman was walking, the trigger in some way got entangled in the man's dress, and caused the weapon to explode, and kill a passer-by. The Board acquitted the prisoner of any intention to fire his gun, but sentenced him to a mitigated penalty of

transportation for three years, for letting off firearms in places where people are about (*id.*). In the case of Han Kuai-êrh 韓怪兒, two men were out together in the country shooting birds, and one of them slipping, his gun exploded, and killed his companion — for which the Court sentenced him to a mitigated penalty of two and a half years' transportation and ninety blows, for letting off fire-arms in the country and killing people 鳥鎗在曠野施放殺人 (H. A. H. L. Supp. vol. IX. p. 17).

In the case of Huang Wên-chih 黃文志, the prisoner threw a stone over his shoulder, whilst walking in an unfrequented place, and chanced to hit a beggar who had turned into the road from a side path. The Court acquitted Huang so far as to say, that using his eyes or his ears would not have prevented the occurrence, and that as it was, besides, an unfrequented road, the case did not, altogether, come under the statute relative to throwing bricks where people are about: on the other hand, the prisoner was to blame in not having considered the possibility of someone coming out of the side path, before

carelessly throwing stones, and sentenced him to one hundred blows and three years' transportation.

In the case of the shepherd Liu Chung-ch'èng 劉忠成, the prisoner was driving some sheep, and inviting a friend to assist him in so doing, he managed to run his driving spear into his assistant, and killed him. Held, that it was done in the hurry of driving the sheep back, but, that he ought to have remembered that his friend was in the fold with him, and he was accordingly sentenced to one hundred blows and transportation for life to a distance of three thousand *li*, under the law relating to shooting wild beasts in frequented places, and unfortunately killing someone in doing so 向有人居止宅舍施放鎗箭打射禽獸不期殺人依弓箭殺人律 (*id.*).

In the case of Wèng Wan-lung 翁萬漜, the prisoner being asked by his friend to give him a spade, instead of taking it, and handing it to him, tossed it over, and accidentally killed him. For this, the offender was sentenced to transportation for life three thousand *li* distant and one hundred blows, under the statute regarding

the throwing of bricks and stones in frequented places (H. A. H. L. Supp. vol. IX p. 18).

In the case of Kao Ch'i-kang 高其崗, the Board allowed that it was a case of accidental death. The prisoner, and a friend of his, had been in the habit of larking together, and one day, as the former was washing out a wine jar, his friend threw some sand over him. The prisoner retorted by splashing his friend, and then running away, to avoid being ducked in return, he jumped over a heap of rubbish in his path: his friend, in chase, attempted to do the same, but slipped, and broke his neck — or, at least, managed to kill himself. Held, although the affair arose out of skylarking, Kao ran away to avoid being ducked, and not to play a trick on his friend — therefore, it was not like a feint in boxing: the man slipped running after him, and he could neither see nor have anticipated what would happen; and accordingly, the case exactly fitted the words of the note to the statute referring to the chance killing of a man whom the slayer had no intention of injuring 初無害人之意偶致殺人之律 — and (*n. b.*), the prisoner was allowed to

commute the penalty of homicide for a nominal fine (*id.*). The case of Liu Chiu-yüan 劉九沅, a boy aged nine, is still more curious. The child was playing with a comrade at splitting sugar cane, and finding himself too short to do it with success, he got on to a wall. The wall was rotten and gave way, and the friend in trying to catch him as he fell, got cut with a knife which his playmate held in his hand, and catching cold in the wound, died within twelve days afterwards. On these facts, the Board laid down, that as the two were certainly not quarrelling, and that as it was impossible to have foreseen that the wall would have fallen, and that the victim running to the rescue would get wounded, and die through catching cold, the case was one of killing by misadventure, and the penalty might be commuted by fine (H. A. H. L. Supp. vol. IX. p. 19).

In the case of Yang Fei-lin 楊飛林, also, the Board found that the death of a child, which slipped from its mother's arms, comes within the statute of killing by misadventure. Here, there had been a slanging match between the prisoner

and another man, consequent on a collision between them, and the man's father joining in, expressed himself so strongly, that Yang's brother felt himself compelled to call on him, and ask for an explanation — Yang himself accompanying his brother, to throw oil upon the waters. At this interview, the other man's wife, carrying her baby in her arms, also came to the front, with a view to intervening, and Yang fearing that the baby would come to grief, laid hold of her coat, to keep her back — which led to her letting the baby drop, and, between the tumble and the fright, it was killed. As Yang's intentions were good, and the consequences could not be foreseen, the Board let him off with a fine (*id.*).

In the case of Kao Tzu-èrh 高子兒, again, the prisoner was let off, it appearing that he was trying to stop a fight, and slipping upon some newly cut paddy, knocked over a man who was reaping behind him, with the consequence that the latter received from a sickle, that he was holding in his hand, a slight, but eventually fatal, wound — for though the cut healed up, the patient insisted on scratching it, and afterwards

caught cold in the sore. It would seem that the prisoner should have been acquitted, inasmuch as he did not know that there was anybody behind him, and had no intention of hurting the deceased or anyone else, and, especially, as the cold resulted from the victim's own carelessness. The Board held, however, that the blame in such a case must lie with the original cause of the injury, and condemned the prisoner, but allowed him to commute the penalty for a nominal fine — as the case came within the statute in regard of people slipping and injuring those walking beside them **核與足有蹉跌累及同伴初無害人之意而偶致殺人之律** (H. A. H. L. Supp. vol. IX. p. 20).

In the case of Ts'ao Li **曹禮**, the prisoner was stooping down cutting vegetables, and when a friend, in chaff, came behind him, and pulled him over backwards, T'sao reached round, and caught hold of him, with a view to having a wrestling match, and accidentally wounded him in the foot. The wound was very slight, and the man evidently died from taking cold, but the Board, treating the case as killing in the

course of a fight, sentenced T'sao to one hundred blows and transportation three thousand *li* from home — the capital sentence being remitted, as the wound was not, in the first instance, a dangerous one (*id.*). In the case of Ch'èn Yü-ch'èng 陳鈺成, the prisoner, while mowing corn, accidentally wounded a gleaner, who had come up behind him, and whom, as he was stooping down, he could not see. The gleaner, catching cold in the wound, died, and the prisoner was merely sentenced to transportation, commutable by fine (*id.*).

In the case of Ch'iu A-hsi 邱阿蟠, two lives were lost by a boat upsetting. It appeared that the prisoner was having a quiet scull, and in passing another boat, wetted the best dress of a lady who was seated therein. Much annoyed, the lady laid on to the prisoner's craft with a boat-hook — hence the accident. The prisoner did not intend to upset the boat, and had no quarrel with the victims, but the Board considered that a capital sentence should be imposed, as the law says 因鬪毆而誤殺旁人者以鬪殺論又鬪殺者絞監候, *i. e.* whoso

accidentally kills a bystander in the course of a fight, shall suffer the penalty of killing a man in the course of a fight — strangulation, subject to revision — and, as two lives in one family were sacrificed, the Board was of opinion that the sentence should be strangulation without revision (H. A. H. L. Supp. vol. IX. p. 23).

In the case of Shih Ch'i-ch'uan 史其傳, the prisoner gave a woman a push, not seeing that she was carrying a child behind her — and the woman, staggering back, the child tumbled down, and hurt itself, and being already sick, died. For the prisoner, it was alleged that he did not see the child, and merely gave the woman the push, to save her from his dogs, which were barking at her. This contented the Provincial Authorities, who considered the case as one of accidental homicide. The Board, however, quashing the decision of the Provincial Courts, put the defence aside, holding that it seemed clear that the prisoner had pushed the woman in anger, because she was pestering him for some money due by him, and, doing so, the prisoner was clearly liable for the consequences (P. A. S. P. vol. XIV. p. 54 — *v. ante*).

Homicide in self-defence. — If one person attacks another with a lethal weapon, the person attacked may kill the aggressor in self-defence, and will incur no penalty thereby: but if the killing be done after the weapon has been wrested from the aggressor, the slayer will incur a slight punishment of eighty blows — and this although the aggressor was still violent, and had just previously had the attacked at his mercy (*v.* case of Li Ch'ing 李清 H. A. H. L. vol. XXI. p. 65). If both parties be unarmed, it is also, quite excusable for the person attacked to kill an aggressor in self-defence (case of Hua Yung-lu 華用祿 H. A. H. L. vol. XXI. p. 66).

It is merely transportation for three years to kill, with a lethal weapon, a rowdy who molests one without cause — but the man must be a bully, and it is not sufficient that he was the aggressor merely. So in a case where the provincial courts fought hard for a mitigated sentence — the man killed being a decidedly bad character, and the aggressor in the case. He had, it seemed, first ravished his step-daughter, then got drunk, and blacked the eye of her aunt, for getting the

girl removed — and finally drawn a knife on the aunt's husband and brother, who had come to her assistance. The Board laid down that, though the ruffian's relations were entitled to hand him over to the Authorities, they were not justified in stabbing and hammering him about the head, after they had knocked him down — and the principal was eventually sentenced to be strangled. It was otherwise, however, in the case of Liu Ssü-k'un 劉四混, wherein a scoundrel — a known bully — molested a person physically much weaker than himself, and started to thrash him. The attacked thereon stabbed and killed the aggressor, and was sentenced to the before-mentioned mitigated penalty (H. A. H. L. vol. X. p. 5).

CHAPTER VII

OFFENCES AGAINST THE PERSON (*CONTD.*) — HOMICIDE (*CONTD.*)

SECTION I — MANSLAUGHTER

MANSLAUGHTER

The subject has already been dealt with incidentally in connection with justifiable and excusable homicide — some special points, however, need attention.

In the first place, the offence may result from extremely indirect causes — and causes, moreover which would appear perfectly excusable, or even justifiable — provided always that there was some preliminary scuffle or fight or even words merely. Thus, in the case of Ho Kuo-ch'a 何國槎, a person was held capitally responsible, because a lunatic he thought was trying to ravish his sister-in-law, ran out into the snow to escape

a beating, and leaving his clothes in the prisoner's hands, got frozen to death (H. A. H. L. vol. XXI. p. 46); and in the case of Ch'è Ta 車大, the prisoner had been slanging an old gentleman, who thereupon made an attack on him, and the prisoner, putting up his arm to defend himself, knocked the old fellow over — with the result that he died the same night from asthma (H. A. H. L. vol. XXX. p. 70). Numerous drowning cases afford good examples. Thus, in the case of Lu Jui-yü 陸瑞玉, the prisoner was capitally sentenced because a rival, trying to avoid him on his raising a hue and cry, tumbled into a stream, and was drowned (H. A. H. L. vol. XXX. p. 62): similarly in the case of Chiang Hung-fu 蔣洪複, wherein some persons carrying off the prisoner's ox before his eyes, stumbled and fell into a torrent (H. A. H. L. vol. XXX. p. 63): and, harder still, the case of Ch'èn Fêng-chan 陳奉湛, wherein the deceased, who seemed to have been the aggressor throughout, flying from the prisoner, took to a boat, and upset it (H. A. H. L. vol. XXX. p. 66). There is an instance on record, however, where

the offender was not so hardly dealt with — for he really had some claims to consideration. It appeared that he had caught a thief, and in leading the latter to the police station with a rope which he had placed round his captive's throat, he stumbled — and dragged his prisoner with him into a stream. The thief was drowned, and his captor was given three years transportation — since, as the Court declared, the deceased was actually to blame (H. A. H. L. vol. XVII. p. 16).

The general custom, rather than the general rule, in drowning cases resulting from two persons wrestling together, seems to be that the survivor's name is placed on the list of cases deserving of consideration, if he was caught hold of by the other, and did not do more than resist; but that the name is merely placed on the list of cases deferred, if the two were struggling together 查同跌落河之案向以被扭未還手者入矜互扭者入緩 (H. A. H. L. vol. II. p. 22).

Interesting points arise in connection with loss of life arising from the unskilful practice of medicine.

It is herein provided that, in such cases, other practitioners shall be called in to examine the nature of the wound, and the kind of medicine administered, and if it then appears that the error, though of judgment, was purely accidental, the practitioner may be allowed to redeem the penalty for manslaughter by fine — as in cases purely accidental — but will not be allowed to practice any longer. On the other hand, where a practitioner, with a view to increased fees, aggravates a malady, with the result that the patient dies, the penalty of decapitation will be adjudged.

The not uncommon offence of depriving persons of necessary food or raiment with fatal issue is apparently considered as a case of manslaughter somewhat aggravated. So also, by way of contrast, if a person privily removes a ladder from beneath one who has ascended a height, or privily removes a bridle from a man on horseback.

Where an offender, who has admitted his guilt, avoids the discomfort of a public execution, by getting a relation of the same degree or an

old crony, to kill him, or to hire someone to do so, the person or persons so killing will be tried under the statutes relating to manslaughter — the penalty being reduced two degrees: if the offender has not admitted his guilt, but asks to be killed, or having admitted his guilt, does not want to be killed, the aforesaid person or persons killing will receive the full penalty. If it be not a relation of the same degree who does the killing, but a junior or servant — such as a son, grandson, slave or hired man — and whether the killing be at the offender's request or not, the sentence of decapitation without appeal will be recorded.

SECTION II — MURDER

MURDER

Great as is the sanctity of human life in China, murder is not the most serious of offences, nor, indeed, treated so severely as in England; for

whereas with us all concerned are treated as principals, in China one only is so dealt with, and is styled the actual murderer 下平殺人
之犯 — the others being treated as accessories only, although the murder was premeditated or deliberate, and they were not only accessories before the fact, but actual parties to the offence.

The original designer is liable to decapitation; the accessory, if he takes an active part, to strangulation, otherwise to servitude only — in all cases the sentence being subject to revision at the autumnal assize.

On the other hand, the Chinese law sternly upholds the principle of life for life, and innocent children may suffer for the fault of their father where, *e. g.*, the latter murders a whole family.

A distinction may be noted in starting. It makes considerable difference, where the murder has connection with another offence, whether it took place at the time of the commission of the offence, or subsequently to it. Thus, for example, a robber or violent abductor, who kills his victim at the time of the robbery or abduction, is sentenced to decapitation without appeal; on the

other hand, if the victim is killed two days later, in trying to arrest the robber or abductor, the sentence is decapitation subject to revision at the autumnal assize (H. A. H. L. vol. IX. p. 30).

Firstly as regards murder deliberately planned or with sudden intent — the former the graver. If a murder had not been previously planned, it will, it appears, be treated simply as killing with intent to kill — although the circumstances were extremely deliberate. So in the case of Ma Shan 馬善, wherein a brute half drunk first beat a child and then killed it, under circumstances of peculiar atrocity; the Board expressed its regret that the case could only be treated as one of killing with intent, and that the sentence must be referred to His Imperial Majesty before being carried out (H. A. H. L. vol. XXX. p. 54).

If the offender kill a bystander, in place of the person whose death he designed, the case is treated as killing with intent, and the offender,

if the sentence be confirmed, is sentenced to decapitation. If fire-arms be used in a fray and at hazard a man is killed, the act is held to be unintentional murder; and similarly so, if in attempting to commit suicide by shooting himself, a person kill a bystander: fire-arms are rightly considered by the Chinese dangerous weapons, and their use is restricted under severe penalties (P. A. S. P. vol. XII. p. 52).

If the offender kill a man's children in the attempt to murder the father, the case is considered as deliberate murder—penalty, decapitation execution deferred.

In cases of deliberate murder, it matters not how long after the person lingers — *v. Manslaughter* — (H. A. H. L. vol. XXII. p. 50).

Attempted deliberate murder, if the other party be injured in any way, is punishable with strangulation execution deferred, and with one hundred blows and transportation for three years', if the other party be not injured.

A good contrasted example of deliberate murder is that in the case of Wang Shên-ju 王仲入, who first tried to kill his wife, for wanting to

kick him out of the house as a dissipated worthless fellow — and then, thinking that his mother-in-law must undoubtedly be at the bottom of the matter, deliberately killed her. He also killed two neighbours who came to the rescue, and, to add a sense of completeness to the case, deliberately killed a woman, wife of one of the said neighbours, for giving the alarm. Two of these murders were deliberate, two in the heat of the fray — and though it was admitted that the case did not strictly come within the Act, the offender was sentenced to immediate decapitation, for killing three of a family in a fight (H. A. H. L. vol. XXVIII. p. 12).

Murder with a view to plunder is regarded more seriously than ordinary deliberate murder; but, to bring a case under the clause providing for the decapitation and strangulation of the principals and accomplices in such a case, there must have been an original intent to murder with a view to benefit thereby 圖財害命之案必起意圖財先戕其命而後得財始依例分別首從斬絞立決 (H. A. H. L. vol. XXII. p. 53). The intent to plunder is not

enough, though the victim be murdered to prevent discovery after the object has been attained — and the essentials are, envy of a man's possessions, desire to obtain his property, and designed killing for the purpose of obtaining it (H. A. H. L. vol. XXII. p. 55). And, as regards the description of the property coming under the clause, a son or a wife is considered as much a valuable as, for example, a handsome pipe (*id.*) — and to carry either of these persons off and sell them will render the offender liable to the above penalty (cf. case of Chang Chu 張柱 H. A. H. L. vol. XXII. p. 56).

In regard of robbery followed by murder, it is to be noted, that it is equally murder where the robber does not with his own hand kill his victim, but is the direct cause of the death of the person robbed — even from mere alarm, and nothing more: as in a case where a man, whose boat was being robbed, jumped into the water in his alarm, and was drowned — *nota bene* the victim was neither threatened nor pursued (H. A. H. L. vol. XVI. p. 8).

As regards murder connected with immorality,

there is this difference from ordinary murder, that all the parties to it, if parties also to the immorality, are treated as principals, and sentenced to decapitation subject to revision (H. A. H. L. vol. XXIV. p. 58). In its side issues it is also severely visited. An adulterer who gave the injured husband satisfaction, and shot him, would be decapitated — and the *causa teterrima belli* would also be capitally sentenced. The gallant Colonel who satisfies himself, and then gives the injured husband satisfaction, is not often to be found in China: and an adulterer who killed his love by accident, in trying to kill her husband, whom he afterwards ran through, was punished as if he had killed two of the same family (H. A. H. L. vol. XXVIII. p. 13): and the same penalty was adjudged a man who killed an injured husband and his brother, who tried to lay hold of him *flagrante delicto* (H. A. H. L. vol. XXVIII. p. 14).

Murder with a view to quarter, or otherwise maul, the limbs of the deceased for magical purposes, entails on the principal in the offence the punishment of being sliced to pieces: accessories in the offence are liable to decapitation: members

of the household of the principal — *e. g.* his wives, sons and daughters, servants and slaves — are liable to transportation for life to a distance of 2000 *li*.

It is murder, entailing the penalty of decapitation without revision, to cause the death of a man by vengefully burning his house or ricks — though it was intended only to injure him in property, and not in person. *Circonstances atténuantes* will however be allowed, if the offender could scarcely be said to come under the above category, and the deceased contributed to his own death. So in the case of Ko Wên 葛文, who falling out with his dead niece's father-in-law for refusing to give her a proper funeral, tried to burn the clothes she had left behind her, to mark his disapproval of the proceedings. The father-in-law tried to prevent the burning, stumbled, and, falling into the bonfire, was burnt to death. For this, the offender was sentenced to one hundred blows and transportation for life to a distance of three thousand *li* (H. A. H. L. Supp. vol. XIV. p. 41).

To wilfully occasion some venomous animal — such as a snake — to bite a person with mortal effect, entails decapitation.

The once common practice of burying alive was not, at one period, considered murder. It is so now. Therefore, unless a great moral lesson is to be enforced, and it is desirable to make an example of one's offspring, or of one's wife, or the public regard the act with favour, and are ready to lend a hand, burying alive should be sedulously avoided.

As regards murder and relationship, the chief features have already been dealt with. A person convicted merely of a design to kill his or her parents or grandparents is liable to instant decapitation — and no distinction is made as regards principals or accessories in the offence, except in so far as touches the respective relationships of the parties to the person whose killing they design. A design to kill a senior relation within the degrees of mourning, entails for the principal transportation for life to a distance of 2000 *li*: if a blow is actually struck in accomplishment of the design, the principal will be strangled: if the murder is actually committed, decapitation will be adjudged to all concerned.

That a junior relation should be sentenced for

murder is, in brief, one of the easiest things imaginable; and that a senior should be so sentenced is one of the hardest. The latter event may, however, happen — as where the tie has, for good reason, been dissolved; or where, as in the case of a wife, a husband, who has suffered her to play the harlot, kills her deliberately therefor — when he will be strangled (H. A. H. L. vol. XXVI. p. 2): and it will be the same if the husband does not do the killing himself, but forces her to do so (H. A. H. L. vol. XXVI. p. 3). On the other hand, even in plain cases of murder or manslaughter, a senior may not only escape capital punishment, but fare lightly — although it was not even a relation that was killed. So in the case of Mrs Li 瀝氏, who threw a stone at her son and killed a bystander; and in the case of Mrs Liu née Tsêng 劉曾氏, who deliberately sent her son some poisoned cakes, and killed a companion of his (H. A. H. L. vol. XXXII. p. 6): and it appears from a case that, even if two innocent persons have thus perished, a light penalty will still only be inflicted — even commutable by fine (H. A. H. L.

vol. XXX. p. 7). Such is the effect of relationship!

As regards murder of children (not relations), the law is specially severe; and where it is with a view to rape or robbery, exposure of the head is superadded to immediate decapitation (H. A. H. L. vol. XXII. p. 58). The provision applies to children under ten years of age only, and does not extend to cases where there was no previous deliberation (H. A. H. L. vol. XXX. p. 54) — unless, indeed, the child was killed in trying to save its relations, when, by special decree of the 21st year of Ch'ien Lung, the sentence of decapitation is to be carried out without appeal (H. A. H. L. vol. XXX. p. 55).

One of the most common incitements to murder is the desire to get a neighbour into trouble — either for the purpose of “squeezing”, or in revenge for some injury. Instances are numberless, but a good and curious example of a blackmailing case is that wherein a certain beggar, being hard up, proposed to a professional friend of his, that they should murder somebody, and blackmail a respectable person, by charging him with having committed the offence. His friend agreed, and

making the same proposal to others, they readily gained more associates. One of the body having procured some poison, and between them having bought or stolen some wine, they trapped their game and started off to the house where they intended to levy blackmail. On the road, the poison was administered, and the man duly dying, the associates proceeded on arrival to tax the master of the house with beating him to death. So, again, in the case of Chou Tsung-shêng 周宗勝, a thief being threatened with prosecution, killed his wife, and charged the prosecutor with it, to make him drop the case (P. A. S. P. vol. X. p. 23).

SECTION III — SUICIDE

SUICIDE

Chinese law views this offence in many respects in much the same way as English law — though there are, of course, present many of the usual peculiarities — mostly, as regards side issues.

It is sometimes classed as an offence against religion — to Heaven a person owes his being, and to Heaven he is responsible for due care of the gift.

A peculiarity of the offence is the nicety with which it is regarded; and not only is the proximate cause considered, as — *c. g.* — to commit suicide from shame 羞忿自盡, from rage 忿急自盡, or from mere excitement 情急自盡, but the proximate reason of the cause is also considered, as — *c. g.* — why was the suicide ashamed, or in a rage, or excited? On these points as they arise.

As regards an agreement to commit suicide; if two persons agree to die together, and one performs the act successfully and the other does not, if there is proof, in the shape of sufficient wounds, that the survivor really meant to die, the penalty of transportation for life will be adjudged: if there is no such proof, the sentence will be strangulation, as an accomplice in deliberate murder. So in the case of Huang T'ing 黃亭, wherein the only proof was the prisoner's own statement, that he had swallowed the poison,

and vomited it forth again (H. A. H. L. vol. XXXVI. p. 36); and in another instance (v. case of Liang Chi-kuang 梁計光), poison was swallowed, but with inadequate effect (H. A. H. L. vol. XXXVI. p. 35).

If the agreement be with a parent, the surviving son will be decapitated, regardless of any considerations (H. A. H. L. vol. XXIII. p. 45).

An agreement with another, to profit by the schemed suicide of that other's parents, is naturally heavily punishable. As in the case of Yin Hsi-hsien 殷希賢, who entered into a scheme for getting some money out of the death of a friend's mother, and was sentenced to servitude in the New Settlements — although he took no part in the affair, and the lady was quite willing to hang herself (H. A. H. L. vol. XXIII. p. 58).

A class of case which not unfrequently arises is that, when two persons agree, that one of them shall pretend to commit suicide, in order to extort money or profit from another — and the suicide instead of being sham, by some accident is actually effected. What is to be done with

the surviving party? The question depends upon the merits of each case. Thus, in the case of Ch'èn Yi 陳義 and Kuo Ming 郭明, — two persons who, being in need of funds, mutually agreed that the latter should pretend to commit suicide by hanging at one of the Gates of Peking. The affair came off — but Kuo Ming, instead of pretending to hang himself, actually did so. As regards Ch'èn Yi, it appeared that the original idea was not his; but that he did not dissuade Kuo Ming, and in the hope of sharing the plunder had accompanied the latter, and even assisted him in hanging up the fatal rope — taking, however, no further part in the ceremony. No statute appeared to exactly apply, and Ch'èn was sentenced under the one which most nearly did so — *i. e.*, that providing that, in cases of wounding with a view to extortion, the accomplice should be held equally guilty with the principal, save that in case of death resulting, the capital penalty was to be commuted. Further, as the prisoner did not adjust the rope, or kick away the stool, or take, indeed, any part in the final hanging, the commuted penalty of penal servitude

for life was further reduced to one hundred blows of the heavy bamboo and three years' transportation. A not very dissimilar case was that of the druggist Tsêng Shêng-chi 曾盛積, who knowing that a certain drug, in limited quantities, would cause apparent death, from which the victim could be revived, supplied it to an acquaintance Ch'ên Ta-ning 陳大凝, — with a view to the latter pretending to commit suicide, and extorting money from those who would get into trouble thereby. Ch'ên, unfortunately, took an overdose and died. Held, that this was not a dissimilar case to the foregoing; that the druggist and deceased were in agreement; and that, in particular, the case corresponded with the provision prescribing servitude for life 3000 *li* distance for those who, in helping another to extort money, wound or kill the latter.

To assist another to commit suicide, renders the person so assisting liable to capital punishment, as an accomplice in deliberate murder (H. A. H. L. Supp. vol. VII. p. 35). If a person exhorts another not to commit suicide, and the latter, notwithstanding, does so, and the assistance was

confined to some such small act as carrying a stool for the suicide to mount upon, and the person assisting leaves before the design was carried out, a mitigated penalty will be imposed (*id.*).

Looking on at a suicide renders the onlooker to some extent liable — penalty, transportation for life to 3000 *li* distance.

Where the person assisted was a relation the effect, of course, differs. To aid a parent to commit suicide, is punishable with the lingering death: but if the junior was not present at the suicide, and he took a passive position — saying, when his parents announced their intention, that he would avenge them — the penalty will merely be instant decapitation. Mere approval by a junior without more, is, indeed, construed severely, and the approving junior treated as an accessory to a case of premeditated murder. So in the case of Li Shang-yu 李尙有 — a beggar sentenced to decapitation, because he approved his elder brother's (also a beggar) expressed intention of dying at the door of a man who refused him the liberal alms he asked for. The prisoner was not present, when he hanged

himself, nor did he assist him to do so — but the Board was of opinion that his brother would not have killed himself, if the prisoner had not said that it was the only way to get satisfaction (H. A. H. L. vol. XXIII. p. 50).

Special extenuating considerations do not appear to have much weight, where the suicide of senior relations is concerned. So in the case of a mother-in-law, who obtained poison from her daughter-in-law, by telling her that she was only going to pretend to take it. Here the daughter-in-law was in the first case sentenced to be sliced to pieces, and on special representation of the hardship being made, the only mitigation allowed was decapitation subject to the Autumnal Revision (H. A. H. L. vol. XXIII. p. 54). Another hard case is that of the younger brother Yang Wên-wan 楊文萬, who bought arsenic for his elder brother, on the latter stating that he would choke himself if it was not procured. Strangulation on the spot, instead of lingering death, was the only mitigation (H. A. H. L. vol. XXIII. p. 55) — considerable, of course, in law.

If a wife assist her husband to cut his throat,

she will be sentenced to decapitation — with a faint chance that, by a representation, the sentence may be revised (H. A. H. L. vol. XXIII. p. 41).

Obviously, a senior who aids a junior, or one in that position, to commit suicide, will not be treated so hardly as the other way; but the offence is yet regarded as somewhat serious, even if it be at the suicide's express request. In the latter event, the sentence will be transportation subject to revision; as in the touching case of Ting Wan-nien 丁萬年, who buried his wife alive at her especial request, out of solicitude for her sufferings — apparently corns (H. A. H. L. vol. XXIII. p. 38). To merely *buy* poison, knowing that a younger brother intends to kill himself therewith, is not lightly punishable (H. A. H. L. vol. XXIII. p. 53).

Where one person endeavours to prevent another from committing suicide, and the latter kills the former, the case will be considered as deliberate murder — and sentence in accordance; but the case will be entered on the list of Cases Reserved; and an only son may commute the penalty (*v.*

case of T'ien Chêng-t'ai 田正泰 — P. A. S. P. App. vol. I. p. 1).

There is a curious view of suicide which needs attention, and that is the responsibility incurred by one, who, in some way, is the cause of it. The responsibility may arise from words or deeds, and firstly, as to the former.

Threats are a common cause. So in the case of Chou Ying-mao 周應玘, a girl had been betrothed to the prisoner's son by her mother while the father was away abroad, and, on the father's return the marriage had been broken off by the magistrate — it appearing that the father had already betrothed her to some one else. The prisoner did not attempt actual violence; but as he went to the house of the parents of the girl, and shouted out from the road that he meant to carry her off, and she incontinently hanged herself, the Court excused him, indeed, the capital sentence, but sentenced him to transportation (H. A. H. L. vol. IX. p. 37). So, again, in the decidedly hard case of Hsiao Wên-han 蕭文翰, where the prisoner had good ground for thinking another a thief, though it appeared he was not

so. Tracing the suspect to his house, Hsiao found his man had left by a back door, and so scared the fugitive's wife by the threats he used, that she first hanged her children, and then herself. For this, Hsiao was sentenced to decapitation, and Hsiao's two watchmen, who saw the supposed thief pass the enclosure they were guarding, and gave the alarm, to transportation. The threats used to the woman were simply to the effect that there was a warrant out for her husband's arrest, and that she must inform the latter of this on his return, and that his family would be held responsible until he was caught (P. A. S. P. vol. XVIII. p. 10).

Another favourite mode with the Chinese is to worry a person to death: so if one person proceeds to dun another 前往催討, and the latter commits suicide in consequence 因其逼討, the former will suffer, dependently on the merits of the case. Mere nagging, for reasonable cause, cannot always be considered worrying. So in the case of Mrs Li née Wang 李汪氏, wherein a woman, being swindled out of her jewellery by the son of Liang Shih-jung 梁世榮, wanted

the latter to pay her its value. This Liang declined to do — and being bothered by her, he jumped into a pond, and drowned himself. The woman was acquitted of worrying Liang to death, but sentenced to a fine for doing what she should not have done — as her asking the father to pay up had led to loss of life.

The acts of a person, whether designed with a view to annoyance, and causing suicide, or not so designed, and yet causing suicide, are obviously another source of responsibility. On the former point, there is a curious case, wherein a younger brother, desiring to extract some money from his elder brother, sent, first of all, his wife to worry him until he admitted the claim. The brother standing firm, the woman sat down in his hall and wept — occasionally torrentially abusing 混罵 him. So far, words, not deeds, had been employed. But the woman, failing with the former, proceeded to knock her head against the wall, and to charge the brother with doing it; and wound up by smashing his crockery, and twisting the necks of his children (here both words and deeds were employed). This was

about as much as the man could stand; but his brother, not content, sent some friends to reason with his elder — the reasoning consisting in catching his gold fish, cooking and eating them, and drinking the solitary jar of wine (here deeds not words were employed). This being too much, the man straightway went and hanged himself. For this, the brother was held responsible, and sentenced to strangulation; the wife, acting under her husband's orders, was sentenced to transportation, but allowed to pay a fine instead: and the friends, punished under the invaluable statute dealing two hundred blows to those who do what they ought not to do.

Where suicide results from impropriety by deed, the affair will be treated seriously; but if the advances were only verbal the punishment will be light, or none at all. So in the case of a married woman, a person who makes her physical demonstrations, and so causes her to commit suicide, will be capitally liable — the penalty being commutable occasionally to transportation. On the other hand, if — as the Emperor Ch'ien Lung remarks in an edict of the 49th year of his

reign — the advances were merely verbal, though the sentence be capital, it must be the invariable rule to pass over the names of such offenders.

Nor, again, can a man be justly sentenced to death, if the woman committed suicide only after considerable consideration (*c.g.* a month), and had in fact in the meantime made it up (P. A. S. P. vol. XVIII. p. 29).

Where the suicide results from a slanderous attack upon the propriety of the lady, suggesting, for instance, that she had been too intimate with her nephew, and that the suggester will take his affidavit to that effect — the sundry remarks being sandwiched with strong and nauseating expressions — the slanderer will be sentenced to strangulation subject to revision (*v.* case of Yü San 余三, P. A. S. P. vol. XXVII. p. 28). These and similar cases form, furthermore, considerations in that intangible portion of Chinese Law, the Law of Libel and Slander — apart from their bearing on the ever present Law of Responsibility.

Where, indeed, the suicide results from any slight thing said or done, which in any way has

reflected upon the propriety of the object, the punishment will be transportation 3000 *li* distance. So, in the case of Chu Hsiao 朱小, so sentenced for pinching a young lady in the dark — who was resting with his *inamorita* (H. A. H. L. vol. XXXV. p. 38): and of Kuei Ning 貴凝, who, wanting to say something to his wife, laid hold by accident of a friend — who was resting with her upon the stove bed (H. A. H. L. vol. XXXV. p. 36): and of Chu Mao-t'ang 朱茂堂, who tried to kiss a young lady — who tumbled over, in trying to get out of his way in the street. But the offender must have said something or done something 是必實有穢語褻狎足令本婦聞而生忿方可照例定擬. So Chin Yao 金瑤, was only bamboosed for doing what he ought not to have done, when he got drunk one night, and took a snooze on what he thought was his friend's bed, but which turned out to be that of an old maid — the latter committing suicide and receiving a tablet of honour (H. A. H. L. vol. XXXV. p. 39).

A curious case is that of the thief Hsü Erh

徐二, who, to avoid pursuit, took refuge under a lady's couch — and so alarmed the latter, that she forthwith killed herself. For this suicide, the thief was held responsible, and sentenced to transportation for three years: the lady, for killing herself under the trying circumstances, and for her nobility of mind, was rewarded with a posthumous tablet (H. A. H. L. vol. XVII. p. 16).

In connection with the general subject of responsibility for suicide, there is a peculiar clause in the Code styled 威逼人致死, or the *forcing* a person to kill himself. This is a consideration of itself, and has no connection with what has already been stated. Instances occur — not infrequently — in connection with robbery. To make a person responsible under this clause it is laid down, in ordinary cases, that the offender must be really in a position to make a person put an end to himself. A wife, however, is held responsible, if she runs away from her husband, and he poisons himself (H. A. H. L. vol. XXXIII. p. 37); and she will be sentenced to immediate execution, if she is

a naughty woman, and a scold, and her husband hangs himself rather than give her a divorce (H. A. H. L. vol. XXXIII. p. 40). Certain weighty extenuatory considerations will remove a case from the clause. Thus it is not deemed to be making a man kill himself, if he commits suicide because the prisoner has brought an action against his brother, for money entrusted to the latter which the suicide has stolen — provided the prisoner was not present at the act; but *semble*, if the prisoner was present, and pitilessly refused the suicide's prayer for time, he might possibly be held responsible (H. A. H. L. vol. XXXIII. p. 63). On the other hand, a debtor is responsible in a degree, if he has a fight with a creditor, and the latter hangs himself in disgust (*id.*).

It is specially forbidden to attempt to commit suicide in the Palace Lake, or the moat in the Imperial City — and though the would-be suicide was sick or poverty stricken, and therefore could bear life no longer, he will be cangued for half a year, receive one hundred blows, and be sent to servitude on the frontiers. If a

person, in a fit of lunacy, intentionally drowns himself in these forbidden spots, his relatives will get into trouble; but they will be excused if the lunatic fell in by accident (H. A. H. L. Supp. vol. X. p. 57). And these strictures also apply, but in less degree, to a spot within the limits of the court in the Imperial City 任紫禁城內, or within the walls of the Palace 圍牆以內 — places of peculiar sanctity.

CHAPTER VIII

OFFENCES AGAINST THE PERSON (*COATD.*) — INDIRECT RESPONSIBILITY FOR DEATH

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

The most curious chapter in Chinese Law is that dealing with the punishment of those, who by misconduct, have in some way been responsible for the death of another — that is to say, have caused another's death, though taking no positive part therein, and not even contemplating it. The subject has in some slight measure already been touched upon, but is so important as to need some attempt at concentration.

This responsibility, then, is of two chief kinds, according as it arises from the death of a senior relation, or of one not a relation — and the former variety is the more curious, and being

so, will be dealt with first. But because it is so dealt with, it must not be taken that it is the more important — on the contrary, the wider application of the doctrine is of quite equal importance, but requires far fewer cases to illustrate it.

SECTION II — RESPONSIBILITY OF JUNIOR RELATIONS

RESPONSIBILITY OF JUNIOR RELATIONS.

This form may arise, as will be seen, from a cause of nearly any sort — be it serious and patent, or trivial, accidental, and obscure: but, once the death of a senior relation can be traced to the misconduct of a junior relation, no matter by how circuitous a route the connection between cause and effect be traced, the junior must suffer.

The nature of the misconduct, and how proximate a cause it was to the death, are matters of weight in considering the sentence, and also the passive knowledge of the relations

as to the misconduct, or their active approval and instigation.

In cases of murder, lechery, or robbery, by a child, no matter how indirectly the child's offence may be connected with the parent's death, or whether the parents are killed or die by their own hand, the sentence is strict and instant performance of the capital penalty. Simply becoming liable to a capital sentence does not, however, bring a child within the meaning of the above, although the parent's death be caused thereby (H. A. H. L. vol. XLIX. p. 52) — and in this large class of cases the offender is still allowed the benefit of the consideration of the circumstances by the Board. So in the case of Chêng Wèn-chia 鄭汶甲, (H. A. H. L. vol. XLIX. p. 48), a lunatic capitally sentenced for killing his wife, and in the case of Mèng Hè Shuang Hsi 孟哈雙喜 (H. A. H. L. vol. XLIX. p. 49), capitally sentenced, for killing his uncle, in defence of his father — both Chêng and Mèng being recommended to mercy.

In the case of Li Ch'üan 李全, it was

decided that, in respect of grave offences — such as robbery or lechery — committed by a son, the discovery of which leads to the death of the parents or parent by suicide or otherwise, and *whether or not the parents approved of the misconduct*, the offending son will become capitally liable; and in respect of trivial offences, similarly, the offending son will become liable to transportation for life (H. A. H. L. vol. XLIX. p. 4). This decision was, however, a hard one, and its effect has been modified (*v.* cases of Chang Wên-hsiu and Wang Tê-shêng *infra*).

As to the knowledge of the parents in respect of the offence, the following distinctions are drawn: —

(1) Cases where the parent simply knew of the offence 知情縱容.

(2) Cases where the parents suffered and approved the offence 縱容袒護.

(3) Cases where the offence was committed at their instigation 聽從一教令.

But though there is, of course, the very broadest of distinctions between cases coming

under each of these categories, responsibility, though of varying gravity, attaches to the son in each and all.

The knowledge of the parents may, however, lead to a very considerable mitigation in the penalty. Thus, if the crime be robbery or lechery, the child is sent to a penal settlement instead of being straightway hanged; and in minor cases, though there is precedent for sentencing the responsible child to transportation for life (cf. case of Li Ch'üan *supra*), the better rule is that the penalty should be mitigated to three years penal servitude in cases where the parent approves the offence (cf. case of Chang Wên-hsiu 張文秀 and Wang Tè-shêng 王得繩 · H. A. H. L. vol. XLIX. pp. 17 & 18).

The whole of this somewhat tangled portion of the subject has been clearly unravelled in a leading work. It is therein stated that where the parents are ignorant of a grave offence (by which is meant larceny or lechery) the offender is to be sentenced to strangulation without appeal, if they commit suicide, or are

killed, in consequence. Where the parents allowed the offence to be committed (*i. e.* suffered and approved of its commission), the penalty is strangulation subject to revision, if they are killed in consequence, and transportation to the plantations, if they commit suicide. Lastly, where the parents incited the offender to commit the offence (*i. e.* instigated its commission), the penalty is three years penal servitude, if they commit suicide in consequence, and transportation for life, if they are murdered, or are otherwise killed (H. A. H. L. vol. XLIX. p. 27).

An Edict of the Emperor Chia Ch'ing, dated the 14th day of the 12th month of the ninth year of his reign, states that the effect of responsibility attaching to a son for the suicide of the parents in cases of robbery and lechery committed by him, is instant strangulation. The Edict further states, that if the parents were parties to the offence, the penalty is mitigated — the son being sent to Siberia as a slave; and further, that if the crime leads to the death of the parents at the hand of others, the penalty is

strangulation subject to revision (H. A. H. L. vol. XLIX. p. 16). The last points are illustrated in the case of P'u Hsiao-lao 普小老, who was sentenced to strangulation subject to revision — his mother who had been party to his crimes, trying to prevent the constable from arresting him, and breaking her neck in consequence of a push the latter gave her (H. A. H. L. vol. XLIX. p. 17).

If the offending son *in cases of robbery or lechery has committed a capital offence*, the execution is made immediate, if his parent's or grandparent's death ensue; and even so where he would not be capitally liable for their decease — as where the lechery or robbery has been committed at their instigation. But the simple fact that a son has committed a capital offence leading to the suicide of his parents does not entail the forfeiture of revision, if it is not aggravated by lechery or robbery (*v.* case of Tung Wên-chung 董文仲 H. A. H. L. vol. XLIX. p. 46).

A woman who causes her parents or grandparents to commit suicide by misconducting

herself is not allowed to redeem the sentence — as is usually done where women are sentenced to military servitude — but is sent as a slave to one of the Tartar garrisons. It is no excuse where the scandal causes the death of one of her parents, that the other one approved of her misconduct. So in the case of *M^{rs} Tung née Ch'üan* 董權氏, whose misconduct was permitted by her grandmother for money, but was eventually discovered on the birth of a child — the result being the suicide of her father through shame (H. A. H. L. vol. XLIX. p. 21).

A woman who commits adultery, and thereby causes her father or mother-in-law to commit suicide, will not be saved from instant strangulation by the fact that her husband had condoned the adultery. The consent of the parents must be shown to entitle her to consideration of the sentence: that her husband allowed it, is not enough.

Where the naughty woman's husband is murdered by her paramour, she is allowed some grace, provided she gives the alarm at

once, and is clearly exonerated from all blame in the matter: but the special representation allowed to be sent up with the sentence is not to be made, if it be her father or mother, actual or in law, who is killed — although, like the husband, they may have allowed her to misbehave herself (H. A. H. L. vol. XLIX. p. 30). Notwithstanding, it would appear that — whether of right or not — grace is allowed sometimes. So in the case of M^{rs} Li *née* Lung 李龐氏, the capital sentence was commuted to transportation, because she straightway gave the alarm, and by giving full information, brought the murderer of her grandmother (in law) to justice (H. A. H. L. vol. XLIX. p. 31).

Some relaxation of the law is allowed where the erring maiden has reformed in the interval between her offence and the occurrence of the fatal consequences. This principle was adopted in the case of M^{rs} Huang *née* Yü 黃余氏 — a woman who had misbehaved herself before marriage, but had turned over a new leaf on becoming a wife. Here Huang's father-in-law was murdered by her disappointed lover, and

Huang's sentence, capital in the first instance, was commuted to transportation for life (H. A. H. L. vol. XLIX. p. 43).

An offending child who, by divorce proceedings, or by simple larceny even, causes his parent's or grandparent's death, but who has been badly brought up, or has been encouraged by by his parents to pursue his naughty ways, or has been instigated by his parents to take to evil courses, is absolved from all responsibility, (v. case of Liu Ta-chè 劉大者 P. A. S. P. vol. XXXII. p. 4).

The case of Ch'ao Chêng-ying 趙正迎, shows that if the parents' death be caused by a son who has habitually misconducted himself in certain respects, but who has in other respects been a dutiful son, and whose evil courses have been permitted by the parents, the penalty incurred will be transportation only — a clemency not extending to cases where the misconduct consists of serious offences, such as robbery or lechery. In the case quoted, Ch'ao caused the suicide of his mother by getting into trouble over gambling transactions

of which she had never disapproved. He was excused the capital penalty, in consideration of his generally filial behaviour, and sentenced to transportation only (H. A. H. L. vol. XLIX. p. 8).

To judge from the two cases of Hsia Shèng-t'ai 夏勝太 and Pai Wu-ssu 白五廝, the part that the parents take in the improper training of their children as a factor in determining the penalty due is perfectly immaterial — the sentence in any event being transportation for life if a parent commits suicide (H. A. H. L. vol. XLIX. pp. 9 & 10). In robbery and lechery however, such an extenuating circumstance, when coupled with the parent's instigation of the offence itself, will be sufficient to cause the commutation of the capital penalty — the only notice taken of the parent's death being that the sentence due the offence is increased one degree.

The responsibility may arise from very indirect circumstances, as in the case of Ch'in Ssü-yüan 秦思元 and Ch'in Kuo-yüan 秦勰元. Here, there were two brothers already in prison

for assault etc., consequent on a dispute over a will. Their wives, to cause trouble to the woman at whose instance they had been laid by the heels, poisoned their mother-in-law, and hung her corpse outside the woman's door — so that it might appear that the mother-in-law had committed suicide from grief at her son's misfortunes. It was clear to the Board that the Ch'ins were in no sense responsible directly for their mother's death; but, as the Board pointed out, if the sons had not disputed the will, their mother would not have been murdered — and that being so, they were sentenced to transportation for life (H. A. H. L. vol. XLIX. p. 11). And similarly in the case of Wang Chu-nao 王助饒, who was transported as the *fons et origo mali*, because his brother murdered his mother, to get some persons into trouble, for abusing him, by reason of his digging up their bamboo roots, which had run into his ground (H. A. H. L. vol. XLIX. p. 12).

The following is also an instance of responsibility arising from the most indirect

causes. The offender's mother drowned herself in a pond, in the hope of getting the owner thereof into trouble — she believing that the said owner had induced a countryman, who had been swindled by her son (with her full cognizance), to bring a charge against the latter. It was laid down that though no charge of want of duty could be brought against the son, he had indirectly caused his mother's death, and was therefore sentenced to transportation for life (*v.* case of Wang Yung-ch'ang 汪勇昌 H. A. H. L. vol. XLIX. p. 2).

In a case, however, where the suicide was really the principal in the offence, the son merely acting under his orders, the conviction was quashed — it being held that the father's suicide was the result of apprehension that he would be called to account for the offence that he had himself committed, and not a case where a son had brought trouble on his parents (*v.* case of Ching Ts'ang 荆倉 H. A. H. L. vol. XLIX. p. 3).

A further good instance of indirectly arising responsibility is the case of Ti Fèng-èrh

狄風兒, where the offender trying to raise a loan, raised the suspicions of the husband of the woman from whom he had attempted to borrow the money — leading to his threatening to beat her and to her jumping off a cliff and killing herself. As Ti's dispute with the woman had been settled, and it was fear of her husband that led to her death, he was acquitted of responsibility so far as she was concerned; but was sentenced to transportation, in that his father fearing that he would be taken up, and he thus be left without support, had hanged himself (H. A. H. L. vol. XLIX. p. 6).

In the following case it is hard to see on what principle the woman was held responsible for her mother-in-law's death. The said woman had been decoyed away and sold; but the proceedings had apparently not gone further, when her abductors were arrested. As the abductors denied their guilt, the magistrate sent for the woman's husband to give testimony; and the runners sent to bring him before the Court failing to find him, got to blows with

his family, and were not only beaten, but tied up. Fearing the consequences, the brother of the woman's husband knocked his mother on the head, and said that the police had done it. The woman was held capitally liable, and, as a measure of grace only, allowed to commute the capital sentence by becoming a slave.

In another instance, the offender told his uncle that he had no right to be always finding fault, seeing that his own son was charged with robbery. The uncle, a hard man, utterly upset by the charge — which had been, as it happened, falsely brought against his son — was so affected, that he straightway jumped down the well and ended his woes. For this, the offender was sentenced to death — it being his duty to soothe his relative, not to rub it in (*c.* case of Su Jih-wên 蘇日文 P. A. S. P. App. vol. V. p. 1).

If a wife murders her mother-in-law, or offending against the law of relationship by termagant behaviour towards those senior to her, causes her aunt to commit suicide, it is

not the duty of the husband to sympathise with her — but to give her up to justice. By sympathising and failing to deliver her up to justice, the husband becomes liable (and not liable *only*) to strangulation, while his wife is being cut to bits (*v.* case of Li Chao-hsieh 李紹燮 P. A. S. P. App. vol. VII. p. 1). If on the contrary, the husband merely failed to keep his wife in proper order, he will receive forty blows and be cangued for a month after her execution (*v.* case of Kao Ch'i-shan 高奇山).

Where the case is one of peculiar gravity, the offender who is the *fons et origo mali* may be sentenced to a more severe penalty than that apparently due the offence. Thus, in the case of Chia Ch'èng 賈成, a gambler, (guilty moreover of answering back when his grandmother took him to task, and of cutting and wounding a witness against him), was sentenced to immediate decapitation, as the original guilty cause of his mother's murdering his grandmother. This, notwithstanding that his mother did not commit suicide in consequence

of his misdeeds, and that he could not have foreseen the murder (H. A. H. L. vol. XLIX. p. 11). In another case — that of Tung Hsien-k'uei 董洗魁 — the Emperor refused to quash the sentence of the supreme Provincial Court, sending the offender to the plantations as a slave. This, notwithstanding that the Board had suggested that Tung was not an offender of very deep dye, and that the proper sentence was transportation only. The facts were the death of Tung's mother at the hands of his brother, caused by Tung's conviction for aiding and abetting the sale of a married woman; and, though by law the sentence was scarcely justified, it was a case in which the sanctity of parental relations came into question, and His Majesty would not interfere (H. A. H. L. vol. XLIX. p. 13).

It does not excuse the criminal that the parent's death was purely accidental, provided always it arose out of the crime of the child. Thus in the case of Ch'ang Wèn-hsiu 長文秀, the father who was cognizant of his son's offence, slipped over a crag, and broke his

neck. The accident occurred when he was on his way to the Court to which he had been summoned as a witness. The full penalty, however, would not in such a case be inflicted, and Chang accordingly escaped with three years' penal servitude, instead of military servitude for life (H. A. H. L. vol. XLIX. p. 17 and *ante*).

Even if it is at the hands of the executioner that the parent meets his death, the child is still responsible if the parent's crime arose out of that of the child. In a well-known case on the point, a father not only approved of his son's immorality, but of his own motion committed a deliberate murder to hush the matter up. Yet the son was sent to the plantations as a slave, and the usual grace allowed convicts generally of commuting one hundred blows of the heavy bamboo to a nominal flogging was denied him (cf. case of Chên Ao 甄敖 H. A. H. L. vol. XLIX. p. 19).

The responsibility may arise from apparently most trivial offences — if the effect be to

cause the death of the parents, and if there be no excuse.

In one case, the offender's mother hanged herself because a person brought an action against him for depositing his father's coffin behind the aforesaid person's back-door — the sentence being transportation (*v.* case of Ch'ên Yü-mei 陳育美 H. A. H. L. vol. XLIX. p. 6).

In another case a similar sentence was imposed on the offender, who was a very good son, because his mother hanged herself in fear that he would get into trouble — for slapping his sister-in-law's face (*v.* case of Chü Tè-kuo 鞠得裏 *id.*).

Then there is the hard case of Li Wèn-ch'ing 李文青, who, preferring trade to agriculture, sold his farm. This proceeding so distressed his mother, who had no confidence in his ability to sell coats on commission, that she hanged herself. Li did not foresee this action of his mother, but was nevertheless held responsible and transported for life (*id.*).

Still harder seems the case of Huang Hsing-

chou 黃馨周, — who, in the middle of the night, went next door to get a light from a neighbour's wife. A quarrel arose from misapprehension of Huang's motives, and in its course, the latter interfering to protect his mother, who had got into a fight with the jealous husband, prodded the husband in the stomach. The mother apprehensive of the consequences of this act, hanged herself — and Huang was sentenced to transportation in consequence (H. A. H. L. vol. XLIX. p. 7). Equally hard seems the decision in Sun T'ien-kuei's case 孫添貴, where the suicide seems to have been caused more by the son having been swindled out of the balance of money he had raised to satisfy a gambling debt, than by the original loss (H. A. H. L. vol. XLIX. p. 9).

Very curious is the effect of responsibility displayed in the case of Yang Ta 楊大. The case commences with the theft of a cow by Yang Ta — he stealing it at his father's express command. The theft being discovered, Yang Ta's mother rebuked her husband in

forcible language — to which he objected strongly, and called on his married daughter to assist him in doing his wife to death. The daughter, misliking the business, ran away; and the wife, taking advantage of her husband's unprotected state, laid her plans and deliberately strangled him. For this the wife was sentenced to the lingering death; the son to an increase in the penalty due for stealing the cow, namely military servitude with cangue (the penalty for compassing his father's death under the circumstances would have been transportation only); and the married daughter to sixty blows and a year's transportation — being one degree more severe a sentence than that of one hundred blows, to which as an outsider she had become liable by neglecting to give the alarm.

An adopted child may be held responsible for the death of his adopted parents or grandparents — though not, it would seem, invariably. In the case of Lo Chao-wèn 羅紹文 it was laid down, that as Lo had been maintained for a considerable period

恩養已久 and established in life 配有家室, he was responsible for the death of his adopted grandmother — who had committed suicide on the discovery of a theft perpetrated by him at her instigation (H. A. H. L. vol. XLIX. p. 19).

In another instance, a woman was sentenced to three year's penal servitude for obeying her adopted mother's instructions to play the harlot — the old lady hanging herself on the case becoming public (*v.* case of M^{rs} Wu née Li 吳栗氏 *id.*).

SECTION III — RESPONSIBILITY OF OTHERS

RESPONSIBILITY OF OTHERS

The law of indirect responsibility does not, from this view, supply such curious examples as is the case where relationship is concerned — but the bearing is wide and singular enough. It is noticeable that adultery affords the best instances.

If an injured husband kills his wife, the paramour will be held accountable for the death and sentenced to three years' transportation; and if the husband, after killing his wife, proceeds to commit suicide, the penalty is made a degree heavier, and the paramour will be sentenced to one hundred blows and transportation for life (H. A. H. L. vol. XXVI. p. 8). If furthermore (a very good example) the relations of the husband or wife commit suicide, unable to bear the thought of his sorrow or her shame, the paramour will be liable and sentenced to decapitation. And so, again, in a somewhat strange case, wherein a complaisant husband laid a charge of treason against the adulterer, because the latter would not pay a sufficient fee; in consequence of the charge, many innocent people came to grief — and the law holding that the trouble arose out of the adulterer's misplaced affection, visited him with the consequences (H. A. H. L. vol. VIII. p. 11). And so also, in a more strained sense, of mere slander regarding another's wife — if the jealous husband kills her, the slanderer

will be capitally responsible (H. A. H. L. vol. XL. p. 31), and the jealous husband, under special grace, may be excused with three years' transportation. And thus of slander causing a woman to commit suicide: and, *semble* (in such case — but in a measure only) even of unconscious slander — as where 'the cat is let 'out of the bag' 失口道破.

General impropriety affords numerous instances; as in the case of Han Ssu-fu 韓思伏, wherein the offender, knowing that a certain damsel had misconducted herself, took her round the waist — and the woman in turn resisting, seized the offender by his cue, and made so loud an uproar, that the aggressor slapped her on the face, and proclaimed what he knew about her. In rage and shame the woman hanged herself. As the woman was not virtuous, and the offender did not succeed in his attempt on her, the Board did not claim that he should be sentenced to death, but considered that he should be transported for life 1000 *li* from home (H. A. H. L. vol. XXXV. p. 2).

There are of course many examples to be given besides merely adulterous or improper ones. For instance, if the result of a fight, supervening on a quarrel arising out of unfair competition on the part of another, is the accidental killing of a man who interferes, the unfair competitor, as being *fons et origo mali*, will be held in a measure responsible for the death — but in a measure only, and not under the clauses relating to homicide etc., but under the general clause dealing with doing what ought not to have been done, and eighty blows only will be awarded (*v.* case of Wang Chên-wên 王振文 H. A. H. L. vol. II. p. 25). And again the curious case of Kao Yung-hsiang 高泳祥, wherein it appeared that a certain Kao, a Court attendant, by putting leading questions to a prisoner under examination in a certain case, had extracted from him a false declaration that an innocent person was concerned in his offence — leading to the said person dying in prison. To give false evidence against a person is identical with bringing false accusations; and

to make a man swear to what is false is very much the same thing as deliberately inducing him to do so. Kao was therefore held responsible for the death — the penalty however being reduced (H. A. H. L. Supp. vol. XVI. p. 30).

Instances of this wider and important bearing will be met with most commonly in connection with the particular offence in point — *i. e.*, murder, manslaughter, or suicide (*q. v.*).

CHAPTER IX

OFFENCES AGAINST THE PERSON (*CONTD.*) — ASSAULT ETC.

SECTION I — GENERAL CONSIDERATION — COMMON AND AGGRAVATED ASSAULTS — IMPORTANCE OF WEAPONS ETC. — INFLUENCE OF RELATIONSHIP

GENERAL CONSIDERATION

The term is not so comprehensive as with us, but the law on the point is relatively far more considerable. In strictness the term includes only assault and battery 毆打 : there is rarely any difficulty in determining whether a certain act is an assault or not within the meaning of a specific section of the Code : there rarely arise any questions such as an assault by construction (*v. fatal assault — infra* however). There must be some demonstration or exercise of physical force in excess of the requirements of the circumstances and accompanied by *mens rea*.

The law hereon is bulky by reason of the preciseness of definition, and the variations consequent thereon. Of necessity it is of importance to consider the kind and extent of the injury, and the mode by which it was committed, the intent of the assailant, and the relationship of the parties. From its own nature, and that of this book, the subject has been dealt with incidentally, but the points herein concentrated should be marked.

Limit of time. — As in homicide, so in assault, certain limits of time have been fixed for the purpose of regulating the responsibility of the doer of the injury.

The same considerations arise here as in homicide — *viz.* the nature and extent of the injury in the first instance, the manner in which inflicted, the subsequent cause of injury or aggravated injury, the class of offence in the first instance, and the consideration of relationship.

If a wound has been inflicted with a stick, or the hands, or feet, or any non-lethal weapon, and the injury is apparently not considerable,

a period of twenty days is required. If the wound has been inflicted with a sharp instrument, with fire, or with scalding water, a period of thirty days is required. If bones have been broken or dislocated, or violent bodily injury has been inflicted, or the victim is a woman or child, a period of fifty days is required. If within the above stated periods the victim recovers, and no permanent injury remains, the penalty due the offender is reducible two degrees; if, on the other hand, permanent injury or disability remains, after a recovery from the strict effects of the wound, the offender becomes liable to the full penalty for such aggravated injury.

Definitions. — Assault cases are styled 鬪毆之案: the person who commences an assault 原毆: and the person guilty of an assault 毆打之人.

COMMON AND AGGRAVATED ASSAULTS

A *common or simple assault* is an assault causing no injury, or but slight injury, $\frac{\text{and}}{\text{or}}$ committed with a non-lethal weapon — *e. g.*, with a stick, a hand or a foot. It is punishable

with penalties varying from bambooning to transportation for life. To drag a woman into the street 將○○揪出街上, hurt her breast 掐其乳, and butt her nose with the head 用頭撞其鼻梁, is an assault — although there are no marks, and although the woman owed her assailant money. The penalty herein will be sixty blows and one year's hard labour. To beat cruelly 非理毒毆, would generally be considered a simple assault.

The following are instances of aggravated assaults.

An assault *causing serious bodily harm* 毆人至癱疾 is an assault committed either with lethal weapons or causing serious bodily injury. Strictly the term implies to make a cripple 篤疾 of another. The offence is variously punishable by transportation in varying degrees or capitally. Mere cutting and wounding (*v.* also next topic) is not punishable capitally; but under certain special circumstances of aggravation it may be so punished — as where the injury was very serious (*c. g.*, to gouge out a person's eyes 挖瞎人眼睛, to slice off a person's ears, nose, and tongue 金抉人耳鼻舌): or where the cutting and

wounding was aggravated by another offence as attempted rape, when the sentence will be strangulation — and if aggravated by actual rape the sentence will be decapitation, and this whether it be the victim who was cut and wounded or her parents and relatives. That the weapon was wrested from the parents hands is no defence (*v.* case of Liang Yung-ch'ang 梁勇常 H. A. H. L. vol. LII. p. 17).

An assault *with intent to merely kill* (not to murder) is simply treated as assault — common or simple if no serious damage be done, but aggravated if fire-arms or lethal weapons are used. A curious case on the point is that of Fêng Haining 馮海凝, who being angry with a father, passed his wrath on to the son, and cut his throat on sudden impulse. Here the Board decided that it was a case of aggravated assault with lethal weapons (H. A. H. L. vol. XXX. p. 51).

An assault without intent to kill, but ending fatally, is a *fatal assault*, carrying the penalty of strangulation execution deferred. If the assault lead eventually (but after a considerable period)

to death, the penalty is transportation for life. A mere challenge to fight is considered a fatal assault (*v. Accidental Homicide*).

An assault *with intent to murder* is a capital offence, though unsuccessful. If the assault be upon a man whom the offender had dishonoured, the woman, though ignorant of the offender's design, will be transported for life as an accomplice; but she will not be liable capitally, if the offender, in attempting to assault the husband, assaults others by mistake and kills them: and she will not be liable in any measure if the marriage had not been properly consummated (H. A. H. L. vol. XXIV. p. 35).

An assault committed *within a privileged locality* may justly be considered as, in a sense, an aggravated assault — inasmuch as the offence entails aggravated penalties. So a simple assault committed within the precincts of the Imperial Palace is punished at the least with one hundred blows: an assault therein with the infliction of a cutting wound entails two degrees heavier penalty than in ordinary cases: an assault committed within the presence chamber or audience hall entails a

penalty of one hundred blows and transportation for life to a distance of 3000 *li*.

IMPORTANCE OF WEAPONS : SIGNIFICANCE OF
'DISABLE', 'MAIM', ETC.

If weapons be used, the nature thereof, is, as will have been already gathered, of great importance in determining a case — often out of proportion to the actual bodily injury done: so to wound another with a gun or pistol shot 施放鳥鎗打銃傷人 is more serious than to wound him with a sword — though the injury in the latter case be the more serious: and to wound with a sword or sharp instrument 刀傷 is more serious than to inflict the injury with a heavy club. To wound with a murderous weapon generally is styled 兇器傷人.

The Chinese expressions corresponding to 'disable', 'disfigure', 'maim' etc., have a very real significance. It may be of considerable disadvantage to a woman — even to a man — to be deprived of good looks (and a slash across the face has certainly an unsightly appearance); but the mere deprivation of good looks caused by a slash,

not otherwise injurious, in no way impairs capacity to work for a living, and will not be punished so severely as to remove, say, an eyebrow; and a slash across the back of the head, though doubtless startling and painful will not be so severely visited as the removal of the little finger — unless, indeed, the brains ooze from the said slash. Again it is more serious to render a person's private parts useless 毀敗人陰陽 than to cut off his nose — for it is perfectly easy to do without a proboscis, and false noses can be procured. On the whole of this question the law has been laid down with nicety, and the legal expense incurred for injuring teeth, fingers, toes, hair, ribs, eyes, tongue, backbone etc., carefully assessed. So to break two fingers, two teeth, two toes, or to tear away all the hair of the head, is punishable, in each case, with sixty blows and transportation for one year — a somewhat cheap rate. To break a leg, an arm, or to destroy an eye, on the other hand, is punishable with a penalty of one hundred blows and transportation for three years.

INFLUENCE OF RELATIONSHIP

This is, as usual, very great — in especial with the closer relationships (*v. Relationship*).

The principal assaults into which considerations of relationship enter are as follows: — assaults on parents or grandparents; assaults on husbands; assaults on relations generally in the first, second, third, fourth, or fifth degree; assaults by a wife on her husbands relations, or upon children by a former husband; assaults by widows upon the parents of their deceased husbands; assaults on relations without the ordinary five degrees; assaults by pupils upon their masters, or by servants or slaves upon their masters, or by slaves upon free persons; assaults on persons of privilege and officials. The majority of these points have already been dealt with, and but a few words are now offered on that last mentioned.

To strike an individual of the Imperial Blood, though not within the degrees of relationship to the Emperor, entails sixty blows and transportation for one year: to slightly wound such a person,

entails eighty blows and two years transportation : to inflict a cutting wound, entails a punishment not exceeding 100 blows and three years transportation. For a private person to strike a high official entails 100 blows and transportation for three years, 100 blows and transportation for life to a distance of 2000 *li*, or strangulation subject to revision, according as it was a mere striking, or striking so as to cause a slight wound, or striking so as to cause a severe cutting wound. The penalty in these cases is reduced, where the official struck is not a high official; but is in no case to be reduced so as to render the punishment less than one degree more severe than in ordinary cases. The rules regulating the penalties where officials strike and wound each other are numerous and not particularly interesting — minute distinctions being drawn as to respective grade, jurisdiction etc. etc.

SECTION II — FALSE OR UNLAWFUL IMPRISONMENT —
ABUSIVE LANGUAGE.

FALSE OR UNLAWFUL IMPRISONMENT

Any unlawful detention or restraint of a person is an 'imprisonment'. The term in strictness, however, applies to those, who having disputes with others, instead of obtaining the proper legal remedy, carry away their opponents, and detain them in private places. This offence is punishable with eighty blows; but if the person or persons so seized sustain severe injury in consequence of the imprisonment, the offender or offenders are liable to a punishment two degrees more severe than in ordinary cases; and, if death result, to strangulation subject to revision.

ABUSIVE LANGUAGE

"Mere words can never amount to an assault". This is as true in Chinese as in English Law — but though mere words may not be punishable as an assault, they may yet be punished — and it may be with severity — under the sections of the

Code relating to abuse. It must be understood that by abuse is herein meant strong and exciting language; and, moreover, the tone in which the language is delivered is cogent in considering its strength or excitement. Slanderous language is not included within the law on this point.

The reason given for the legal discipline hereon is that abuse is not unlikely to provoke a breach of the peace, not only as between the parties themselves, but in regard of bystanders.

The offence is variously punished according to the relationship of the parties concerned. Between equals, a penalty of ten blows is inflicted; and if they take to mutual abuse ten blows each. To abuse parents or grandparents entails strangulation. For a slave to abuse his master also entails strangulation. To abuse officials generally is punished with 100 blows.

CHAPTER X

OFFENCES AGAINST THE PERSON (*CONTD.*) — RAPE ETC.

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

Strictly speaking, the offences dealt with in this chapter are part of the Law of Morality, and, at nearly every turn in the discussion of these offences, moral sentiment is introduced. Many are the tablets awarded those virtuous women who from a dainty fear have destroyed themselves: and often in the Reports do the phrases occur — ‘unable to overcome her anger and shame she jumped into a pond and drowned herself’ 羞忿莫釋投水殞命, ‘poisoned herself’ 服毒身死 etc. China is a highly moral country — highly moral, but impropriety

is particularly common, is the inevitable conclusion.

On the whole, this class of offence is treated with great fineness of distinction — a peculiarity probably most clearly emphasised in the case of abduction. Other notable points are the general severity of the punishments, and, where they are concerned, the natural leaning of the law on the side of the woman — ‘because of the ‘importance of a woman’s reputation’ 誠以婦女名節爲重.

SECTION II — RAPE

RAPE

This offence includes actual and attempted rape and indecent assault — and in some measure unnatural offences.

It is essential that the offence be committed without the consent of the other party: the amount of force used, and the results thereof, are considerations for aggravation.

As regards consent, not only is it sufficient to take an act out of the category of rape that the consent be given precedent to the carnal knowledge, but also that the consent be given subsequent to it, but before completion **強合以和成猶非強也**. It will however be rape if, although consent has been given, the patient cry out before completion, and the prisoner has employed force to effect his purpose (*v.* case of Wu Ch'i-lu **吳奇綠** H. A. H. L. vol. LII. p. 12); but the penalty is mitigated in the latter case — if *c. g.*, the prisoner has killed the patient, from decapitation certain, to decapitation subject to revision. It is looked upon as rape if the consent has been forced from the woman by worrying her for money she owed the prisoner (H. A. H. L. vol. LII. p. 22): or where the prisoner pretended that he had already effected his purpose while the woman was asleep (*id.*): or where drugs are employed (*id.*): or where she is merely frightened into compliance **嚇逼姦污**. But it is not apparently looked upon as rape to carnally know a sleeping woman, if there is no resistance (*id.*).

The penalty for ordinary rape is strangulation subject to revision (H. A. H. L. vol. LII. p. 17): if with force, the penalty is strangulation certain: if causing death, decapitation certain (*v. supra*).

If the victim is given to improper courses, the capital punishment will be commuted (*v. case of T'ien Wên-hsing 田文興* H. A. H. L. vol. LII. p. 4 — and cases p. 20): and it is strongly laid down in case after case that clear distinction must be drawn between instances where the victim had no claims to virtue, and those wherein chastity was attacked (*v. case of Kuo Ching-a 郭精阿* H. A. H. L. vol. LII. p. 3) The law however allows of repentance even in abandoned women, and a gallant will be guilty of rape to the full penalty if he forcibly carnally know a reformed bad character, although previously known to him only in the capacity of a dissolute 犯姦之婦 — a creature incapable of moral regeneration. The return to virtue must be real, and the woman must not simply have thrown over her acquaintance because she was tired of him, or because he had no more money, or because she preferred a handsomer man. On the

other hand the return may be made at past the eleventh hour — as where a willing dissolute squalls out midway (H. A. H. L. vol. LII. p. 13).

As regards children. Distinction is herein drawn as to the rape of a child under twelve and under ten years of age — but no distinction is drawn as to sex. As respects consent; in the case of a child under twelve its consent is of no weight, unless it has previously gone astray — in which case the full penalty will be commuted to transportation (*v.* case of Ch'ih Chu-êrh 遲柱兒 H. A. H. L. vol. LII. p. 15). Under ten, consent is in no case of any weight (H. A. H. L. vol. LII. p. 16).

Rape of a child under twelve is punishable by decapitation subject to revision; and if the child's death be caused by injuring it during the rape, however unintentionally, the sentence will be carried out at once (*v.* case of Wu Yün-ts'ung 武雲從 H. A. H. L. vol. LII. p. 11).

Rape of a child under ten is punishable by decapitation without appeal as a scoundrel 光棍: and, where a ruffian not only rapes, but chokes, a child of so tender an age exposure of the

head will be added (H. A. H. L. vol. LII. p. 15). If the offender be but a youth, and stops midway, a representation may be made to His Imperial Majesty of any mitigating circumstances, and the execution of the sentence may be deferred for consideration (v. case of Sun Hsiao-lien 孫小連 H. A. H. L. vol. LII. p. 10 —⁴ and case of Tuan Ssu 段四 H. A. H. L. vol. LII. p. 9).

Successive rape 輪姦 is an heinous form of ordinary rape, and is visited with decapitation without appeal for the principal, and strangulation subject to confirmation for an accomplice. If the victim of successive rape die of exhaustion, the case is not treated as murder, but as causing her death without intent to do so, and is punished in the same way as if she had committed suicide — in either case, the penalty being decapitation without appeal for the principal, and immediate strangulation for the accomplice. In the case of successive rape aggravated by murder, the principal will be decapitated and his head exposed, and an accomplice decapitated (H. A. H. L. vol. LII. p. 4).

As regards *attempted rape* 強姦未成, the penalty for an ordinary offence is one hundred blows and transportation for life to a distance of 3000 *li* (H. A. H. L. vol. LII. p. 17). If the attempt has not gone beyond a little fumbling, the full penalty will generally be commuted; as in the case of Ku Liu 賈六, who, sleeping in a brothel, took indecent liberties with a female lying upon the same stove bed — proceeding no further on her crying out, the penalty was commuted to servitude for three years (H. A. H. L. vol. LII. p. 14). And again in the case of Fan Yu-chin 范有金 when the liberties proceeded rather far, but the sentence of permanent transportation was declared erroneous (*id.*).

It is a capital offence to cut and wound the victim in attempting her honour, and to use edged weapons: but there must be cutting, and with edged weapons. If the victim be injured in any other way, the sentence of transportation will be increased to military servitude (*v.* case of Li Hsüeh-hsieh 李雪些 H. A. H. L. vol. LII. p. 20). Causing miscarriage, though of an eight months' old child, does not make an

unsuccessful attempt at rape capital (*cf.* case of Li Fa 李法 H. A. H. L. vol. LII. p. 1); and, in the case of Wang Hu-tzu 王虎子, it was authoritatively laid down, that merely procuring miscarriage by the offence is additional "injury by means of other than sharp "instruments" (*id.*).

The definition of a 'child' in attempted rape is a person under twelve years of age, and the penalty for raping such a person in ordinary cases is military servitude (H. A. H. L. vol. LII. p. 15). To take a child of nine into a barn, with intent to carnally know her, and she consenting, is held attempted rape; as in the case of Wang Ching-chou 王景周 — the offender herein, out of consideration for his tender years (fifteen) was sentenced to a mitigated penalty of temporary banishment (H. A. H. L. vol. LII. p. 7).

It is considered a case of attempted successive rape, if two offenders had the intention of successively ravishing the victim, although, assistance coming at the crucial moment, neither of them succeeded (H. A. H. L. vol. LII. p. 20).

Rape, successive rape, or attempted rape by officials upon those within their jurisdiction, involve, in each case, two degrees heavier penalty than in ordinary cases: and, it may be added here, that a similar aggravated penalty attaches where the offences chanced during a period of mourning for parent or husband.

SECTION III — INDECENT ASSAULT — FORNICATION —
UNNATURAL OFFENCES — CARNAL OFFENCES CONTRARY
TO RELATIONSHIP — PROCURATION —
PROCURING ABORTION

INDECENT ASSAULT

The Chinese do not appear to make a distinction between this and attempted rape, so far as the classification of the offence is concerned — but consider the circumstances in the sentence. It is ordinarily punished with transportation of one kind or another, whether the offender desisted on resistance being offered or consequent on the interference of bystanders

(*v.* case of Wang Pu-t'ing 王步廷 H. A. H. L. vol. LII. p. 19). The gravity of the punishment varies according to the gravity of the assault; so an indecent assault upon a child twelve years' old was punished with one hundred blows and three years' transportation — the indecency being but moderate (H. A. H. L. vol. LII. p. 15): and in another case, with an accompaniment of circumstances of rather greater indecency, the offence was punished with transportation for life (*id.*).

FORNICATION

This is punished with eighty blows, and the pander is liable to seventy.

An unnatural offence (*q. v.*) upon an adult, or a boy over the age of twelve, in either case subject to the consent of the parties, is treated as a case of fornication somewhat aggravated — both parties receiving one hundred blows and one month's cangue, and the person permitting it in his house being punished as a pander (H. A. H. L. vol. LII. p. 27).

In regard of officials, fornication with those within their jurisdiction entails a penalty two degrees heavier than in ordinary cases — the other party is however punished as in ordinary cases.

Two degrees heavier penalty is also added when the offence took place during a period of mourning for parent or husband.

UNNATURAL OFFENCES

Such are treated in the same way as ordinary immorality, no distinction being made between male or female.

An unnatural offence is variously considered, according to the age of the patient, and whether or not consent was given. If the patient be an adult, or a boy over the age of twelve, and consents, the case is treated as one of fornication — and both parties are punished under the clause relating thereto: if the adult or boy over age resists, the offence is considered as rape — and the penalty in accordance: if the boy be under twelve years of age, the offence is considered as rape, with the penalty

therefor — irrespective of consent or resistance, unless the boy has previously gone astray (*v. Rape*) — (H. A. H. L. vol. LII. p. 19).

It doubtless appears strange that abominable offences should, on the whole, be treated with but ordinary severity: but such offences are regarded as, in fact, less hurtful to the community than ordinary immorality.

CARNAL OFFENCES CONTRARY TO NATURAL RELATIONSHIP

Adultery. — The penalty for this is military servitude for the adulterer 姦夫, and imprisonment for a period and a flogging for the naughty woman 姦婦. If the husband was a consenting party, the adulterer will receive the mitigated sentence of one hundred blows and three years' transportation, the woman will receive ninety blows (actually administered) and transportation for two years' and a half commutable by fine, while the complaisant husband will receive ninety blows (*v. case of Jèn Ch'ao-tung* 任湖棟 H. A. H. L. vol. XX. p. 28).

If the offence take place during a period of mourning for parent or husband, an aggravated penalty of two degrees attaches.

If the offence be committed by an official upon one within his jurisdiction, a similar aggravated penalty attaches.

The offence is, despite the number of cases thereon, not extremely common; for Chinese women, contrary to the received opinion, are peculiarly particular, and will hang themselves without hesitation 情願自行吊死 if their reputation be aspersed, however slightly 一聞穢語即便輕生 — of this several instances have been given. The offence is mostly important by reason of the incidental points, such as homicide and general responsibility, to which it often gives rise (v. especially *Relationship — Husband and Wife — Justifiable Homicide*, and *Murder*).

Incest. — The prohibited degrees of relationship include, not only the usual five degrees, but also relationships still more remote. The offence is throughout punished with great severity. So to hold criminal intercourse with relations in the fifth degree, is punishable with transportation for

three years and one hundred blows. If in such cases a rape is committed, decapitation is incurred. To hold criminal intercourse with a step-child is similarly punishable. To hold criminal intercourse with relations more remote than the fifth degree, is punishable with one hundred blows — and if in such case a rape is committed decapitation is incurred.

PROCURATION

It is against the law to buy respectable people for improper purposes. A divorced wife cannot be considered altogether a respectable person (H. A. H. L. Supp. vol. XIV. p. 31).

PROCURING ABORTION

This is not capitally punishable, and a person actually administering the noxious thing is only liable to transportation for life — even although the woman dies. If the share taken by the offender was merely to procure the noxious thing, and although fatal results ensue, the sentence of one hundred blows and three years' transportation will be imposed — commutable in the case of a female offender by fine (H. A. H. L. vol. LI. p. 80).

To procure abortion by use of drugs is styled
 用藥打胎: death resulting from flooding is
 styled 以致墮胎身死.

SECTION IV — ABDUCTION

ABDUCTION

This offence is complete once the woman has been carried away from the spot where she was seized — rescue or no rescue 業經拉走者雖當時被獲俱照已成科斷 (H. A. H. L. vol. VIII. p. 55). It is ordinarily punishable with military servitude, but if with great violence, in bodies, or followed by violation, capitally.

The character of the offence differs according to the circumstances under which the woman was carried off — such as the use of force (forcible abduction 搶奪), and the number of those engaged in the offence (the latter point of such importance as to need separate individual consideration) — and further according to additional

circumstances, such as violation. The position of the woman in the moral scale is also a consideration of great cogency. That well-known saying in Chinese law that “to abduct a woman is worse than “to kill her” 是搶奪原較鬪殺爲重 is frequently laid down as a rule — and so treated it is not clearly explicable. It is submitted that it is simply a saying — one of the merely moral oracular Chinese *dicta*: the position of an abducted maiden is morally so grave (and practically liable to such obnoxious public comment) that she ought not to find life worth living.

It is no excuse that the prisoner's intentions were honourable — as, for instance, to relieve the woman's misery, where her former husband had beaten her and turned her out of doors (H. A. H. L. vol. VIII. p. 38). It is no excuse that the woman was seized as a deposit merely — to induce the husband to pay salvage money due the abductor (*v.* the Life-boat case H. A. H. L. vol. VIII. p. 46). It is no excuse that the woman ran away with the prisoner, if he keeps her with him and passes her off as his wife — even a mere mistress of another (*v.* case of

Liu Kèn-ch'èng 劉根誠 H. A. H. L. vol. XX. p. 27). And even if a woman runs away entirely of her own motion to another's house, the latter, if he allows her to stop with him, will get three years' transportation and one hundred blows (H. A. H. L. Supp. vol. VII. p. 21).

It is not permissible for a person to abduct his own wife after he has given her a bill of divorcement — even though merely with a view to make the second husband pay up the marriage portion (H. A. H. L. vol. VIII. p. 44). It is not permissible to abduct the slave of a relation, although in a measure property (H. A. H. L. Supp. vol. III. p. 58); the offence is not so serious, however, as carrying off the slave of one not a relation (*id.*).

Even where the offender had in some sort a good right to carry off the woman, and was in simple ignorance of fact for which he was not responsible, the ordinary penalty is not much mitigated. So in the case of Li Tzuí 李梓, wherein the offender had arranged to marry a widow, and had paid the marriage portion to

her friends, though the marriage contract had not been delivered 收受財禮未給婚書. Her friends subsequently determined to break off the match, and sent back the presents; but the offender knew nothing about it — as the person entrusted with the return of the presents appropriated them himself. Hearing that his intended's friends were sending her away, and suspecting they meant to marry her to someone else, the offender carried off the woman, but did not force her to complete the marriage. For this the abductor did not indeed receive the full penalty, but was sentenced to transportation for a term (H. A. H. L. vol. IX. p. 34). The case of Li Hsiao-yang 李小羊 seems even harder. There the offender carried off and compelled to marry him a woman who was perfectly agreeable, and whose friends had accepted his wedding gifts, and the penalty of transportation for life was adjudged — as it appeared that the relative who had arranged the marriage was not the one legally entitled to do so (*id.*). The Authorities, however, admitted that there was some ground for the offender's action 事尚有因.

The following are considerations for substantial mitigation or complete extenuation: — (*a*) where the woman is returned by the offender, and the latter delivers himself up to justice: (*b*) where the woman had no claims to regard.

In respect of the latter point, a woman who has been sold and resold without objection, cannot claim that her reputation has suffered by her abduction: nor can a woman who has been put up for public sale 與販婦女: nor can one who has passed through a broker's hands, whether in obedience to parental orders or otherwise — but herein if she be sold to a respectable family she becomes a respectable woman 既經賣入良家即屬良家婦女. A divorcee is considered to have no claims to consideration, and much less a woman who has remarried before her late husband is well cold (H. A. H. L. vol. VIII. p. 31). A woman with whom the abductor has been very intimate is also no fit subject for consideration (H. A. H. L. Supp. vol. III. p. 57); and though great violence was employed in carrying her off, the sentence will be simply transportation for life

instead of capital (*id.*) — a certain amount of violence is permissible between intimate friends. And in this connection it is of the utmost importance in cases of abduction to determine, not merely what degree of intimacy (if any) existed between the actual parties, but also how intimate the abductor was with the family of the woman abducted. In regard of the general question of intimacy, such considerations as these are considered cogent: — Were the parties merely accustomed to visit each other from time to time? (*i. e.* on merely visiting terms 時相往來): was she accustomed to meet him without running away? 與○○習見不避: did she avoid him after she had grown up and see him no longer? 迨年長即避忌不見. Further, the word ‘intimacy’ does not necessarily imply *immoral* intimacy 姦宿.

A question of much force in the determination of the offence is as to the number of those engaged therein. It makes all the difference whether one or more offenders were concerned. If two were engaged, the principal will be sentenced to decapitation subject to revision, and

the accessory to transportation for life. And, again, it makes a great difference whether more than two were engaged; for, in that case, the principal will be sentenced to immediate decapitation, and the accessories to strangulation subject to revision — whether the woman was maltreated or not, and (contrary to the general rule) whether or not the woman was actually removed from the spot (H. A. H. L. vol. VIII. p. 50).

As regards the revision of the sentence of strangulation for the accessories, it was provided in the 5th year of Taokuang that in the following cases the sentence should be confirmed. Where the accomplice entered the house, or if the woman was violated, where he assisted in dragging her off, although not actually entering the house: where the accomplice had been engaged in joint abduction more than once: where he assisted in putting pressure on the woman, thereby causing her death, or where the death of a person who tried to arrest the offenders was caused by resistance thereto — whether the accomplice himself was physically

responsible for the death by actually wounding the intervener, or whether the accomplice merely lent his countenance to resistance: where the woman had been sold and cannot be traced: where the abduction was by two or more in the open air — the accomplice taking actual part therein. All other cases with the revised capital penalty were to be entered on the List of Cases Reserved, with a view to their commutation (H. A. H. L. vol. IX. p. 51).

If the joint abduction be of a dissolute, the penalty is much reduced. So if the offence be by more than two persons, the principal will be sent to the Mahomedan settlements as a slave, and the accessories will be transported for life 3000 *li* distance.

Again, where the families of the offender and the girl are connected 素有瓜葛, and there has been previous proposal of marriage, some mitigation is allowed. As, for instance, where more than two persons are concerned — when the principal is sentenced to death provisionally, and the accessories to transportation. On the other hand, if there was no tie subsisting between

the families, a mere proposal of marriage acts as no sort of extenuation.

Furthermore, if the principal sends the woman back unharmed, and delivers himself up to justice, he will only be sentenced to penal servitude on the frontiers; and an accessory in such case who delivers himself up will be sentenced to transportation for three years merely — increased by three months' cangue if he be in the service of the family of the girl abducted.

It seems not entirely irrelevant to mention in conclusion that case, well-known to foreigners at the time as the 'Wenchow Abduction Case' — an illustration of how the law on this topic is worked where a foreigner is concerned. The facts were that a nun was carried off by the aforesaid foreigner's servants, and was subsequently ravished by him — the abduction taking place, according to the Chinese Court, by the express orders of the master. The foreign Court acquitted the European both of the rape and abduction; but the Chinese authorities insisted on dealing with the natives concerned, and finding the head boatman guilty as accessory to abduction and

rape, sentenced him to strangulation, and carried the sentence out. There is little doubt that the sentence, under the circumstances, would not have been carried into effect — if Chinese alone had been concerned; for a nun's virtue is, in that country, a doubtful quantity, and the law would certainly have been satisfied with the life of the principal alone. On another showing, also, it would appear that the execution was even actually contrary to law; for the Court admitted that the boatman was a servant acting under the orders of his master — and being so, his sentence should have been reduced.

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SECTION V — PROTECTION OF CHILDREN — KIDNAPPING

PROTECTION OF CHILDREN

When lost, strayed, or fugitive children are discovered, they should be handed over to the care of the nearest magistrate.

To detain a lost, strayed, or fugitive child

as a slave, wife, or child for a long period, entails a penalty not exceeding eighty blows and transportation for two years: to do so for a short period, entails a penalty not exceeding eighty blows. To sell a lost or strayed child as a slave involves transportation for three years and one hundred blows. To sell a fugitive child as a slave involves two and a half years' transportation and ninety blows; and the fugitive so sold incurs one degree less punishment than that incurred by the seller.

KIDNAPPING

This offence differs from abduction in that it must be accomplished by stratagem, and further that the kidnapping must be with a view to subsequent sale: furthermore, abduction applies merely to women, and there is a considerable element of immorality in the offence — kidnapping applies equally to man, woman, or child, and there is no element of immorality involved.

The offence is variously considered according to the position of the person kidnapped, the purpose for which the person kidnapped was

sold, and the general circumstances under which the kidnapping took place.

A few examples only are given.

To kidnap a free person, and afterwards offer such person for sale as a slave, entails on all concerned transportation for life to a distance of 3000 *li* and one hundred blows — whether the sale be effected or not. To kidnap a free person, for the purpose of selling such person as a wife, or for adoption, entails on the principal transportation for three years, and one hundred blows. If, in such case, the person in question resists and in consequence is killed, the offender will incur a penalty of decapitation subject to revision. Where the person kidnapped was a slave, the penalty in all the above cases is reduced a degree.

The harbourers and purchasers of persons kidnapped are liable to the same penalty as the persons who kidnap.

CHAPTER XI

OFFENCES AGAINST PROPERTY — LARCENY

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

The offence, on the whole, covers a wide field. It is as a subject in Chinese law curiously divided and considered; and points which with us could only well arise in the case of so distinct an offence as, for instance, burglary or house-breaking, commonly arise in China in connection with larceny — be it what we call simple or aggravated: and, moreover, what with us are distinct offences, are treated in China merely as forms of the primary offence of larceny — *e. g.* substitution.

The chief division of the subject is into larceny committed by stealth, and larceny committed openly: the former is theft, the latter robbery. What is meant is, that though in both cases it is essential that there should be a taking without justification 憑空將他人財物或搶或竊據爲已有, in theft the taking is by stealth 匿跡潛蹤, but in robbery the taking is done openly 公然攫取 (H. A. H. L. vol. XVI. p. 24).

Robbery is not of necessity punished more severely than theft, both equally depend for their gravity upon the attendant circumstances and conditions, and it is in consequence of this latter point that probably more space in a Chinese law book is given to robbery than theft — for the former lends itself to special circumstances.

It may be well to note that the word *tsei* 賊, usually translated robber or thief, does not mean merely this, but is applied “to all persons “who set the authorities at defiance by acquisitive “acts of violence” — and inasmuch as “the “object which it is sought to acquire may be a

“bag of money or the Empire” it results that *tsei* implies “either robber, or bandit, or rebel”. *Tao* 盜 is the generic term for larceny — theft being *ch'ich tao* 竊盜 and robbery *ch'iang tao* 搶盜.

The taking. — (a) That the full penalty for an act of larceny may be inflicted, the taking must be without any sort of justification or excuse; and reasonable, but sometimes trifling, and occasionally very questionable considerations, will create — even in aggravated cases — sometimes partial, and occasionally complete extenuation, so far as the larceny is concerned. Thus one person has a claim against another, and violently carries off the latter's cattle in satisfaction thereof — penalty eighty blows only. Again if the aforesaid claimant chances to kill the cattle owner, the penalty will be that for killing in affray, or ordinary murder (*v. Debt*). On the other hand, if the taking be without any ground whatever, the mere taking will render the culprit liable to three years' transportation and one hundred blows; and if under similar conditions life is taken, the penalty will be

decapitation without appeal — or assuming several are involved, decapitation without appeal for the principal, strangulation subject to His Imperial Majesty's approval for those guilty in the second degree, and penal servitude for life on the remote frontiers for simple accessories or third parties. There is also another curious point in this connection, if the cattle or property carried off do not belong to the person against whom the carrier has a claim, it would seem that the case will not be considered as one of larceny. So in the case of Chêng Ch'ien-ts'ai 鄭乾彩, where a creditor and some friends of his tried to carry off some cattle owned by a debtor jointly with his brother, and the latter being killed by one of the creditor's friends, the Board refused to allow the case to be dealt with as one of robbery and murder (H. A. H. L. vol. XVI. p. 4 and *post* — *Debt*). And so also in the case of Li Hsing-t'ai 李興太, awarded a mitigated penalty (but not for larceny) under somewhat similar circumstances (H. A. H. L. vol. XVI. p. 6).

Occasionally the claimant, previous to his action,

has indulged in words or a struggle — merely as a mode of bringing his just demands before his debtor. So in the case of Ou P'êng-shun 歐朋順, a convict who first having words with his master, because he would not pay his wages, then proceeded to rob the latter — the case being treated as simple theft, with penalty therefor increased by two degrees (H. A. H. L. vol. XVI. pp. 4—5). And in the case of Liu Lao-kung 劉老公, the culprit was owed 300 cash by the man with whom he was struggling — and though he killed his victim, and considered 7200 cash necessary to meet his claim, the case was considered as one of killing with intent merely (*id.*). And though the claim was a gambling one, similar actions would be similarly treated (H. A. H. L. vol. XVI. p. 6).

A person may even clear out another's premises, and carry off his stock, and escape with transportation for life — if he has some lame excuse like Li Chia 李欖, to the effect that "he refused to give me some money to go in search of my wife, who had been in his

“service and had bolted” (*id.*). A mere grudge against an establishment for dismissing the culprit (though for a good enough cause) has saved the aforesaid culprit from the full penalty for simple larceny of some useful articles in the said establishment.

The reasoning is occasionally even more strained and far-fetched. For instance, it is not robbery to relieve a friend because he will not lend a ‘fiver’ (*id.*). And if two parties being on the same footing engage in a fight, and one of them despoils the other, the case will not be aggravated by being considered one of larceny also — the preliminary fight is considered as explanatory of a desire for revenge, and the revenge took the form of openly taking another’s property.

(*b*) Whether or not there was an *asportation* is a vital consideration in nearly every case (H. A. H. L. vol. XVI. p. 36). The offence may however be found, although there was no removal — the attempt being punished — but not (*nota bene*) with the full penalty. Thus if the offence be in a house, the offenders may be

punished for larceny from the mere fact of entering with that intention — that they gained nothing does not so far materially affect the case: *a fortiori* the offenders will be punished for larceny (though not to the full degree) if they took plunder, but abandoned it on the premises: but for the full penalty to be inflicted, the things must have been carried off the premises. Even in dealing with the gangs of robbers with which Western China is infested, the penalty is less by one degree, if no plunder has been obtained.

Certain distinctions are furthermore herein drawn, as to the nature of the object taken, and the extent of the asportation. Thus, with valuables, it is sufficient for the full penalty to have taken and concealed them about the person: but strings of cash, and common articles of furniture, must have actually been carried effectively away, to secure conviction for the full offence, or indeed for larceny in any degree: so in an instance wherein a prisoner was acquitted of the offence, after having entered a house, and done up in a bundle a couple of thousand cash — being

caught in the act of carrying his booty away (H. A. H. L. vol. XXII. p. 17). Again, as regards heavy articles of wood or stone, that the full penalty be adjudged, it is necessary that such have been placed on the cart or means of transport provided for the removal. Horses, asses, and the like, must have been removed from the stable: and, in this connection, it is provided that if but one horse has been removed, and others follow forth, the offender shall not be held responsible for more than the one animal. In the case of dogs, hawks, and the like small domestic animals, it is an essential that the offender has obtained physical control over them, in consequence whereof they are actually in the offender's possession. Articles of food are not considered in the light of valuables: contraband salt, of course, is (H. A. H. L. Supp. vol. IV. p. 4). It may be mentioned also that to make away with the plunder of another offender is treated as an ordinary act of larceny (*id.*).

Determination of gravity of offence. — This, apart from special circumstances of aggravation

or special conditions, is chiefly dependent upon the value of the property taken — and ordinarily the amount taken on the one occasion (H. A. H. L. Supp. vol. VI.). For if the offender takes something to-day, and again something more to-morrow, the offences are looked upon as separate cases, though discovered at the same time — and the offender, in accordance with the rule, is tried for the more important only. But if the constant offender is a servant, and has taken from his master, when the latter finds out his several losses at one and the same time, the several amounts will be considered as part and parcel of one offence. There is however some question whether this latter ruling is sound: indeed it is said that the culprit will merely be dealt with as a hardened offender (*q. v.*): and he will certainly be so treated if the losses were not discovered at one and the same time — as where the master is “lying low”.

In reckoning the amount taken, the value of plunder capable of being realized is alone considered: so notes payable to the person

named upon them, or which are not due, are not taken into the calculation. If the taking be in copper cash, one thousand of such are to be considered as equivalent to one tael of silver, and the ruling rate is not to be taken into consideration (H. A. H. L. vol. XVI. p. 60). If clothes be taken, the average cost is to be reckoned the value, and not the amount for which they may have been pawned (H. A. H. L. vol. XVI. p. 61).

If the offenders be several, the value to be considered is that for the aggregate of the plunder taken, and not what the offenders individually have had in their possession or know of (H. A. H. L. vol. XV. p. 63). Moreover the principal will receive a sentence based upon the aggregate sum, irrespective of his individual share, and regardless whether a confederate got away with the bulk of the property, or whether all the property has been lost: the confederates receive lesser sentences — also regardless whether they have received any plunder or not.

If the victims be several, the value to be considered is not the aggregate of the plunder

taken, but the value of the plunder taken from the greatest loser. And this though two or more persons who suffered were lodging in the same hut, or were on board the same boat — case of Li Ming 李明 (H. A. H. L. vol. XVII. p. 3).

Larceny to an amount of one hundred and twenty taels or more is a capital offence; but if under five hundred taels value is taken (and over one hundred and twenty), the case is subject to the Autumn Revision; and if more than five hundred taels, the sentence will be confirmed (H. A. H. L. vol. XVI. p. 66). And, in this connection, if the offenders be several, the principal will be sentenced to death — though his individual share falls short of the capital sum — while the confederates will be sentenced to transportation for life.

Larceny to an amount of one hundred taels or over, but under one hundred and twenty, is punishable by transportation for life 2000 *li* from the offender's home; and if the offender runs away from punishment, and commits a further act of larceny, his punishment will be increased two degrees; and if he so offend

thrice, he will be treated as an incorrigible rogue, and sent to penal servitude on the frontiers of Yunnan Kueichow or the Two Kuang 照積 匪猾賊例發雲貴兩廣極邊烟瘴 — distinction being drawn between one who runs away and commits the larceny before reaching the place of punishment, and one who does so afterwards.

The value put upon the property by the owner is not to be accepted unless evidence is given; and in capital cases of larceny, where there is any doubt as to the value, the words “after the Autumn Assize” are to be added to the sentence of death.

As regards circumstance of aggravation (such as violence and murder), and special conditions (such as relationship), affecting a particular act of larceny, the more common cases require separate treatment; but it may be noted here, as a general rule, that larceny by day is not regarded so gravely as larceny by night, and that larceny from a relation is more leniently considered than larceny from an outsider.

SECTION II — SOME GENERAL VARIETIES

SOME GENERAL VARIETIES

Robbery with violence. — This is considered to be where the offenders are many and carry weapons, as distinct from simple robbery where the offenders are few in number and unarmed. It is an essential of the offence that the violence should precede the robbery, but it is not essential that the violence should have been with a view to plunder. Whether or not the violence was with a view to plunder is very important however; if it was, the penalty of decapitation will be meted out to all concerned; if it was not, the plundering being, as it were, an after-thought, the principal only will be so treated, and the others less rigorously in varying degrees. So in a rule which prescribes that where the robbers are more than ten in number, or carry weapons, the principal is to be treated under the law regarding robbery with violence — the penalty for those guilty in the second degree being reduced a step 夥衆十人以上執持器

械搶奪爲首照強盜律治罪爲從減一等 (H. A. H. L. vol. XV. p. 78).

The scope of the offence is in fact wide; for even if the person robbed receives no hurt, and the robbers do not succeed in getting any plunder, the case is yet considered as one of robbery with violence (though of a milder nature) from the fact of the attempt having been made — the principal being liable to penal servitude for life, and the accessories to transportation for the same period. Indeed, the parties will be liable to transportation for life, if there be distinct evidence that the robbery was contemplated — as judged from the fact that they were caught with arms in their possession, and have enrolled themselves into a band (H. A. H. L. vol. XIV. p. 91).

As regards the arming, it is laid down that anything which can be used for purposes of offence or defence, or for facilitating the robbery, comes under the category of arms and appliances 器械 — whips, sticks, knives, poles, even a ladder. Moreover the fact that only one of the band was armed is sufficient for the whole body

to be considered an armed band (H. A. H. L. vol. XVI. p. 34).

If the robbery be from a house, and the master of the house was put in fear, it is robbery with violence; and accomplices in the robbery may be treated as principals, although they remained outside the house, provided they took part in the act by which the person robbed was frightened. So in the case of Chang Tè-yüan 張得元 and others, wherein the violence consisted in rapping the shutters of a house with a stick and knocking down some tiles from the roof; the master of the house, terribly frightened thereby fled away by a back door, and two men of the party entering the premises, stole what they wanted without opposition (H. A. H. L. vol. XIV. p. 40).

The common offence of stupifying the victims before robbery is also looked on as robbery with violence; and the deviser of the robbery, the preparer of the drug, the person who actually administers it, and (if it be a second offence) all accomplices will be sentenced to immediate decapitation, if the object was effected: others

concerned will be transported to Turkestan. If, though the object was not effected, the victim died from the drugging, all concerned will be equally liable to immediate decapitation — and, if the victim be recovered by some one else, to decapitation subject to revision. In no case will the offenders be allowed any benefit by delivering themselves up to justice (H. A. H. L. vol. XIII. p. 67).

In ordinary cases of robbery with violence, if anybody be killed, whether it be the person robbed, or the police who had come to his assistance, the penalty will be summary decapitation and exposure of the head for all concerned; if anyone be wounded merely, the sentence of decapitation will be summary, or subject to revision, according as any plunder has actually been taken or not (H. A. H. L. vol. XIV. p. 98).

Circonstances atténuantes will be allowed if the offender stopped on the way to the scene of action, and took no part in the affair beyond sharing the plunder. This concession does not extend to one who was a prime mover in the

affair, and was merely prevented from taking any action by sickness (H. A. H. L. vol. XIV. p. 42). Again, all who enter a house robbed are liable in the first degree; but mitigating circumstances are allowed in the case of accomplices keeping watch outside or receiving the plunder — *unless* they are enrolled members of the band, or actually take part in the violence, or use threatening language, or are old offenders. It is important, therefore, to determine the fact of entry. For the purposes of the article on this subject, a temporary shed is considered a house, if the proprietor has clothes or money in it (H. A. H. L. vol. XIV. p. 36).

Robbery and murder. — If in the course of a robbery the victim jumps into the water and is drowned it is robbery and murder, and the offender will be sentenced to decapitation, under the statute of forcing a man to kill himself by robbery 因盜威逼人致死 (H. A. H. L. vol. XVI. p. 8 — *v.* also *suicide* on this point).

Robbery in bodies or mobs armed and unarmed. — As regards robbery in bodies, the general rule

is that where the robbers are less than ten in number and unarmed the case will be treated as a simple robbery 搶奪財物除十人以下又無兇器者仍依搶奪本律科斷: but where the body is of more than ten members, if unarmed, or less than ten, if armed, and the members thereof take advantage of a disturbance to plunder or behave in a violent and murderous manner, the aforesaid members will be dealt with under the special statute relating to the crews of the rice convoys — the principal being treated as a pirate, and the others less rigorously by one degree 如有聚至十人以上及雖不滿十人但經執持器械倚強肆掠果有兇暴衆著情事均照糧般水手例定擬 (H. A. H. L. vol. XV. p. 78).

The law on this point varies, however, in different provinces, and in certain parts of the Empire which are infested by regular bands of brigands 強盜, highway robbery by more than one person is treated as brigandage. The provisions in question are, however, of local application only, and are construed with great strictness.

But elsewhere, if a band of robbers set upon a traveller, or a mob loot a fair, or a gang combine to rob a house, the members thereof are, as a rule, dealt with under the ordinary law stated above; or if the robbery be from a government rice depôt by a mob of starving villagers, but two months' cangue will be added to the ordinary penalty (H. A. H. L. vol. XVI. p. 23). For in general, outside the parts in question, robberies committed by several or in bands are — as in the last case given — the result of the casual coming together of poor creatures led to the offence by hunger. The Chinese law recognises *naturalis acquitas*. The parts to which the special provisions apply are Szechuan, Honan, Anhui, Hupeh, Shansi, and parts of Kiangsu and Shantung. In these provinces, excepting only Shansi, robbery by more than one person, but under four, is punished with military servitude to a distance of 4000 *li*: and if the person robbed be hurt, however slightly, the punishment is strangulation. If the robbers be four or more in number, but under ten, the punishment for the mere robbery is servitude in

Ili — all the robbers being treated as principals. If the robbers number ten or more, the mere robbery is visited with capital punishment. In Shansi, a general provision prevails that robbery by three or more entails a degree greater severity of punishment than for the ordinary offence (H. A. H. L. vol. XVI. pp. 8—11). The above provisions in their entirety apply to what are called ‘armed bands’, to constitute which it is sufficient that but one member of the band has but a knife: but not much distinction is made in the application of the rules to unarmed bands — the various penalties being lessened by one degree.

It seems convenient to notice here the treatment accorded tramps and beggars, who in certain parts of China — more particularly in Szechuan and the adjacent provinces — infest the countryside in swarms. These lean creatures wander the country round, and take whatsoever they can lay hands on, without actually being guilty of larceny (so runs the law). As an exceptional measure, therefore, it is provided that where four or more cases are brought against any such

person, he shall be condemned to wear an iron bar for the space of a year — in addition to ordinary transportation and bamboosing (H. A. H. L. vol. XVI. p. 44). If such beggar or tramp so offends again, he will be condemned to wear the bar for two years; and if this is without effect, for three years. The weight of the bar is 40 catties — about 53 lbs (H. A. H. L. vol. XVI. p. 46).

Robbery during riot. — A very common occurrence in China is that passers — by take advantage of a dispute to invade a shop and carry off the contents; and similarly it often occurs that when a row is excited in a chapel or missionary book store, the mob pour in and clear it out. Complaint is often made in these cases, where foreigners are concerned, that although there were police or soldiers present they did not interfere in any way. The case of Lu Wên-ching 路文經 throws a good deal of light on the whole subject. In the case mentioned, a village postmaster and general commission agent had got into trouble and lost his licence; and one of the said postmaster's

creditors failing to induce his debtor's successor to take over his liabilities, determined to be avenged — forthwith spreading reports of proposed action on the part of the postmaster. As the action in point would have caused considerable local inconvenience, public opinion was quickly excited against the postmaster, and the creditor had no difficulty in collecting together some seventeen men to accompany him to the debtor's house — and, under cover of protesting against the action, to clear out the establishment. As it was a market day, there was a large rowdy element on the spot; and the mob pouring in, the shop was effectually gutted before the police were able to arrive — the officers on the ground contenting themselves with reporting the affair. The ringleader was caught, and sentenced by the Provincial Authorities to death — on the ground that the amount of the plunder was over one hundred and twenty taels in value and that more than ten men were concerned. This judgment was reversed by the Board; the latter pointing out that the punishment for simple robbery — *i. e.* taking a man's property openly — is one hundred blows

and three years' transportation. The Board furthermore quoted the rules relating to robbery in bodies, and held that the present case was nothing more than simple robbery of a somewhat aggravated nature — for though the offence was committed by an unarmed band of over ten members, yet there was no undue violence. The Board further declined to allow the capital sentence, on the ground of the value of the property taken — stating that the total amount acknowledged to by the culprit and his accomplices only came to some seventy-five or eighty taels, and that the other property was probably carried off by passers-by. The principal culprit was, in the result, sentenced to military servitude; the others to one hundred blows and three years' transportation. The conduct of the officers on the spot in simply standing by and merely reporting the disturbance caused no comment.

Substitution. — A not infrequent offence is that wherein one party mixes bundles of his own property with bundles of property belonging to another, and then makes off with the latter's — as, for instance, in the not uncommon

practice of a certain class, who lump down bogus loads at post or stopping stations, and carry off instead the valuable baggage the porters have already set down there, as if by mistake. This offence is considered as robbery or theft, according as the substitution took place openly or by stealth.

SECTION III — SOME SPECIAL VARIETIES

SOME SPECIAL VARIETIES

I. *Larceny by certain persons.* — (a) Firstly as to *relations*.

Robbery or theft from relations (within certain degrees) is not regarded as so heinous an offence as robbery or theft from outsiders, and the nearer the relationship, the less the criminality attaching to the offence. The reason is that all things in China are in some sort held in common, and, as one of the family, a relation is interested in the family property. If, therefore, one relation steals from another, he merely takes what is more or less his own by ties of kindred, and is guilty rather of a breach

of good manners than of actual crime — it is not appropriation of what is another's, but a rude assertion of a right to at once share in what may one day accrue. A distinction is made between the spoliation of children nephews etc., and the spoliation of uncles aunts or elder brothers; the seniors being allowed to steal from juniors — whose duty of course is to dutifully maintain the seniors with comparatively little notice — while the juniors, on the other hand, are warned by a heavier penalty that though, in fact, only anticipating events, they should not give their seniors annoyance by helping themselves without leave.

Though however one relation may with comparative immunity steal from another, if an outsider be introduced for the purpose, the case becomes one of ordinary robbery or theft, and no plea of relationship in mitigation will be entertained — unless indeed the relations be living together, when the offending relation will be excused, and the outside confederate considered as an ordinary robber or thief, with sentence somewhat mitigated (H. A. H. L. vol. XVI. p. 39).

Moreover, if in the course of the robbery or theft, resort is had to violence, the ordinary rules relating to bodily injury done by one relation to another will apply, and the penalty increased or mitigated as the case may be.

The following table gives the various penalties for robbery where relations are concerned, relationship beyond the fifth degree not being taken into consideration: —

From relation of				
1 st degree		by senior	if successful	70 blows
		" "	" attempted	60 "
		" junior	" successful	1½ years' transportation
		" "	" attempted	1 " "
2 nd	"	" senior	" successful	80 blows
		" "	" attempted	70 "
		" junior	" successful	2 years' transportation
		" "	" attempted	1½ " "
3 rd	"	" senior	" successful	90 blows
		" "	" attempted	80 "
		" junior	" successful	2½ years' transportation
		" "	" attempted	2 " "
4 th	"	" senior	" successful	100 blows
		" "	" attempted	80 "
		" junior	" successful	3 years' transportation
		" "	" attempted	2½ " "
5 th	"	" senior	" successful	100 blows
		" "	" attempted	100 "
		" junior	" successful	transportation for life
		" "	" attempted	3 years' transportation

(b) As regards larceny by *carriers and innkeepers*.

Robbery by *carriers*, whether boatmen or coolies, is usually treated somewhat more severely than ordinary robbery, but is not considered as a breach of trust (H. A. H. L. vol. XVII. p. 2). So in the case of a contract to convey goods by boat (the owner of the goods accompanying them), and the boat being wrecked, the carriers make off with part of the cargo they have managed to save. This is robbery (*v.* case of the head-boatman Kao 高老大 H. A. H. L. vol. XVII. p. 3), and the ordinary penalty therefor will be increased by two months' cangue (H. A. H. L. vol. XVII. p. 4) — unless the amount is such as to render the offence capital.

It makes a great difference whether the owner of the goods was present at the time or not; for if he has merely intrusted his property to the carriers, and does not accompany it himself, the offence is “making off with” 拐帶 — not theft — and the penalty cannot exceed transportation for life, whatever the amount; if, on the other hand, the owner was present, inasmuch as the loss may leave him without resource in the

middle of his journey, the case is treated as robbery — not theft (H. A. H. L. vol. XVII. p. 5). The distinction does not however appear to be always borne in mind; for, in the case of Yang Ch'i-yün 楊起雲, who appropriated goods entrusted to him for carriage, although the owner was not present, the offender was sentenced for robbery — and notwithstanding, seemingly, that the reason for the action was want of funds during the journey, and the offender fully intended to make the money good (H. A. H. L. vol. XVII. p. 7).

Larceny by *innkeepers* is somewhat more serious than ordinary larceny, and, in the case of robbery, three months' cangue will be added to the ordinary penalty — unless the amount is such as to render the offence capital (H. A. H. L. vol. XVII. p. 10).

II. *Larceny from certain places or of certain objects.* — (a) Certain heinous offences under this head are incapable of resolution into the ordinary law on the point, and stand apart by reason of their gravity or exceptional nature. So larceny from an Imperial Palace entails

strangulation for all concerned: larceny of an Imperial edict entails on all concerned either decapitation or one hundred blows of the bamboo and branding on the arm, according as the aforesaid edict had or had not received the impression of the Imperial seal: and larceny of an Imperial or magisterial seal entails decapitation for all concerned.

As regards the general law touching larceny in public offices and official residences and of public property 官物, distinctions are drawn between the nature of the office and the nature of the property — but in all cases such an offence is of a more or less aggravated nature. There is a difference in taking official property from a treasury or a granary or from another public office; and for the clauses relating to larceny of public property to apply, the property must have been taken from a treasury or a granary 必須由倉庫中盜出方坐. In other words, a distinction is drawn between larceny in a public office (though in actual fact larceny of public property) and larceny of “public “property”, and the distinction is important because

the latter is treated considerably more severely — the penalty therefor varying from the bamboo to strangulation, according to a scale relative to the value of the property stolen. Nice points arise as to what may fairly be considered a treasury: so money taken from a side room in the Provincial Treasurer's Office is to be treated as larceny in a public office, and not of public property (H. A. H. L. vol. XVI. p. 72): and the accountant's room in a magistrate's office, although the money taken therefrom was public money, is not to be held a treasury (H. A. H. L. vol. XVI. p. 73). Other points arise as to what may be considered a public office. A temporary residence of an official is not so considered — though larceny committed therein entails an aggravation of one degree; and this although the offender had no means of telling that an official was living in the house (H. A. H. L. vol. XVI. p. 69). But the official in question must be an executive officer (H. A. H. L. vol. XVI. p. 73); and a clerk or writer to an executive officer will be considered an executive officer (H. A. H. L. vol. XVI. p. 75).

A public college is not considered a public office, and — *c. g.* — robbery therefrom will be treated as ordinary robbery (H. A. H. L. vol. XVI. p. 73). To break into a walled town by getting through the water gate, and then rob, is treated as robbery from a public office (H. A. H. L. vol. XVI. p. 78). To steal the keys of a city gate is considered in some sort as stealing from a public office — and entails three years' transportation.

The larceny of old registers or documents comes within the provisions regarding larceny in public offices, and is punishable with military servitude (H. A. H. L. vol. XVI. p. 74 — *v. also Unlawful Dealings with Public Stores and Property*).

Larceny of military weapons and accoutrements is on a different footing from larceny of public property etc., distinctions being drawn as to whether the subject of the larceny was an implement or article of dress not exclusively military in its nature — *c. g.* a bow, an arrow, a soldier's undress uniform — or whether the subject of the larceny was some exclusively

military implement or article of dress. In the former case robbery or theft is on the same footing as ordinary robbery or theft; in the latter case the *minimum* penalty is eighty blows for one such article taken — the penalty increasing a degree for each additional article (*v. Making, Possessing, and Trafficking in Arms, etc.*).

(b) Another special variety of larceny is that from *wrecks*. There seem to be rigorous penalties for wrecking. So in a case where a boatman was sentenced to one hundred blows and transportation for life to a distance of 3000 *li* under the appropriate article, for taking wreckage into his boat from a wrecked vessel — the owners of the latter being drowned during the consequent scuffle (H. A. H. L. Supp. vol. V. p. 67). In another instance, where a boat was overturned during a sudden squall on the Yangtze river, the offender instead of going to the assistance of the boat, helped himself to such wreckage as he could collect 並不幫同救援輒敢
乘危搶奪, and under the article 邊海
居民乘危搶奪照搶奪加一等 was

sentenced to one hundred blows, transportation for life 3000 *li* distance, and branding (H. A. H. L. Supp. vol. V. p. 68). Officials who fail to report cases of wrecking which occur within their jurisdiction may also suffer severely: thus a hereditary dignitary in Formosa was stripped of his title for not reporting a case wherein his clansmen broke up and robbed a wrecked vessel 拆搶遭風商般 (H. A. H. L. Supp. vol. V. p. 67).

(c) As regards larceny of *crops*, there is this special point to be noted — if the crops have been garnered, it is robbery, if left ungarnered, it is merely taking (H. A. H. L. vol. XVI. p. 41). So also with the larceny of timber or brushwood, cut or stacked, or otherwise prepared for use — although found in places not under cultivation. In this connection, it is naturally a somewhat graver offence if the aforesaid acts of larceny be from a cemetery; if the latter be an Imperial enclosure, entailing at the least three years' transportation, and if the enclosure be private, entailing at the least eighty blows of the bamboo.

(d) The larceny of *domestic animals*, such as horses, asses, geese, and ducks, is on the same footing as the larceny of crops, timber, etc. — distinctions being drawn as to whether the animals were public property or not, and in the former case the rules relating to larceny of public property applying. Moreover further distinctions are made in regard of the subsequent killing of the animal by the offender, and the kind of animal so killed.

SECTION IV — RECEIVERS OF STOLEN PROPERTY —
SUPPLEMENTARY CONSIDERATIONS

RECEIVERS OF STOLEN PROPERTY

Receivers are, under certain conditions, in a worse case than the actual robber or thief; for whereas the actual offender is punished according to the value of the plunder he has obtained in one offence, although he may have committed several, the receiver of the property will be tried and punished according to the aggregate

value of the property obtained in all the offences. Thus the several larcenies are in respect of a sum aggregating over Tls. 120, but no one of the several victims having lost more than say Tls. 15, the offender will escape with a comparatively slight punishment — perhaps with merely a bamboozing: the receiver, on the other hand, will be liable to capital punishment.

The offence is in fact generally rigorously treated: so the younger brother of a pirate, who devoted a small portion of the latter's earnings to the settlement of a tailor's bill, was sent to military servitude on the borders. Indeed for a person to run away with plunder committed to his care makes him *particeps criminis* (H. A. H. L. vol. XXII. p. 3). Buying goods from a carrier, knowing he had no authority to sell them, is the same as receiving stolen property (H. A. H. L. vol. XXII. p. 1). Moreover to harbour a robber is considered the same thing as setting up as a receiver; and if the harbouring be for the sake of gain 貪利容留, and to the number of three or more, the penalty of military servitude on the frontiers will be adjudged — whether

the harbourer has shared the plunder or not (H. A. H. L. vol. XXII. p. 4).

A receiver who makes a regular business of it will be transported for three years, though the thefts were individually of little account (H. A. H. L. vol. XXII. p. 2). The business is however so popular with a certain class, that capital punishment is alone sufficient to stay the longing — as in the case of a convict, who legally remonstrated with by being sentenced to transportation for a term for the offence, duly served it, and restarted a business on his return.

Pawnbrokers. — When stolen property is found in a pawnshop, it is argued that the pawnbroker, if he did not know it was stolen (and the obligation of enquiry does not seem to be imposed upon him), is entitled to recover the principal sum advanced, losing his interest only — and it appears in a report from the Board, on representation made by the Judicial Commissioner for Chekiang, that the amount is to be recovered from the thief. Where there is no owner for the pawned plunder, the pawnbroker may reclaim it (H. A. H. L. vol. XIV. p. 91).

SUPPLEMENTARY CONSIDERATIONS

Reparation. — Chinese law allows reparation to be made, and if the robber or thief of his own motion restores the plunder he has taken, he will be held absolved. If the offender does so in knowledge that the victim intends to lay an information, still the penalty will be mitigated two degrees; and even if the reparation be made after information has been laid, and a warrant issued for the offender's arrest, the sentence will be mitigated one degree (H. A. H. L. Supp. vol. VII. p. 37 — and *cf. Delivery up to justice*).

Violence in resisting pursuit or arrest. — In cases of robbery with violence, if a robber kills a pursuer rather than give up his plunder, and whether the person killed be he whose property has been taken or a neighbour of the latter, it is decapitation without more ado. But if the pursuer be merely wounded, it makes a difference

apparently whether he was or was not the person whose property had been taken — being decapitation subject to revision in the former case, and in the latter merely an aggravation of the penalty for the original offence. So in the case of Hu Ch'ao 胡超, who, running away, was caught in the court-yard of a neighbour's house by the alarmed occupants — and thereon cut the fingers of a servant. In cases of ordinary robbery or theft, a neighbour who interferes is on a different footing. Furthermore, so far as concerns the mere aggravation of the penalty for the ordinary offence, mere threats by an offender in resisting the recovery of his plunder are sufficient (*v.* case of Sun Lan-t'ai 孫蘭台 H. A. H. L. vol. XIII. p. 35).

Violence by a robber in resisting arrest, if life is lost, is punishable by decapitation — others concerned being also liable, but not capitally. Moreover, where the offenders are several, and in resisting arrest life is lost, the principal in the robbery is alone capitally liable — although the fatal blow was not dealt by him (H. A. H. L. vol. XIV. p. 33). In short,

violence by robbers in resisting arrest is more leniently viewed than violence preparatory to or during a robbery; and this although the violence took place on the actual scene of the offence (H. A. H. L. vol. XIV. p. 34).

CHAPTER XII

OFFENCES AGAINST PROPERTY (*CONTD.*) — EMBEZZLEMENT, ARSON ETC.

SECTION I — PREFATORY — BREACH OF TRUST — EMBEZZLEMENT — APPROPRIATION

PREFATORY

Careful distinction, say the Chinese law books, must be drawn between theft, and the cognate offences — embezzlement 拐帶, misappropriation 費用受寄財物, cheating 誑騙, and swindling 局騙. This for the somewhat strange reason, that although all lead to a person's losing his property, the four last offences are more easily guarded against than the first. But although so careful a distinction is supposed to be made, the rule, it must be confessed, is one of theory rather than of practice.

BREACH OF TRUST — EMBEZZLEMENT —
APPROPRIATION

The chief distinction between these offences and larceny appears to be as to the intention of the offender when he takes the property into his possession: in larceny, the criminal intent being at the time of so taking, in the other offences, the criminal intent not existing at the time, but arising subsequently (H. A. H. L. vol. XVII. p. 8).

As between private individuals, Chinese Law on the whole regards breach of trust, embezzlement, and kindred offences, in somewhat lenient fashion. If a person to whom the goods or money of another have been entrusted wastes or consumes the same without authority from the owner, he will be punished with a penalty not exceeding ninety blows and transportation for two years and a half. If such trustee fraudulently alleges the loss of the property or money confided to him, a penalty one degree less than that applying to simple theft will attach — and based of course upon the value of the property

embezzled. Furthermore, the trustee must restore to the right owner the property — or in lieu thereof, its full value.

On the whole, then, cases of embezzlement and breach of trust are treated lightly. In the case of Ch'ao P'an-ming 趙盤銘, a factor used money deposited with him for his own purposes, and being unable to replace it, was tried as if he had merely stolen it — the due punishment being reduced a degree. The Board furthermore remarked that the offender did not mean to appropriate the money, and though when asked for it he pretended that there must be some mistake, and caused thereby the unfortunate depositor to hang himself, yet the case did not seem to be one for exceptional severity (H. A. H. L. Supp. vol. IV. p. 13). So again in the case of Wang Ts'ung-ch'êng 王從誠, who used his sleeping partner's money for his own speculations; and hiding the fact by keeping false books, he caused his partner to lose in the result Tls. 3000. To steal but Tls. 120 is a capital offence; but the Board considered 90 blows and three years' transportation

quite sufficient a penalty (H. A. H. L. Supp. vol. IV. p. 14. And again in the case of Li Ming-shan 李明善, the offender, for spending some 400,000 cash of other people's money he had wrongfully got into his possession, was sentenced to sixty blows and a year's penal servitude (H. A. H. L. Supp. vol. IV. p. 14). And thus is treated the mortgaging of trust property and appropriation of the proceeds (*id.*).

Government funds etc.: appropriation, defalcation, and misapplication thereof. — The provisions — whether in the Code or elsewhere — relating to the embezzlement or appropriation or malversation of Government funds and property are numerous, interlocking, at variance, and in general perplexing. Thus there is embezzlement or appropriation of public property; embezzlement or appropriation of military supplies; embezzlement or appropriation by high officials, ordinary officials, or supernumeraries; malversation by high officials, ordinary officials, or supernumeraries. Furthermore, there are the special circumstances of each particular case, constantly varying each head or sub-head of the

particular offence. A few special points are noticed.

The scale of punishment for defalcations of Government funds is as follows: —

Under Tls. 330 — one hundred blows heavy bamboo and three years' transportation 2000 *li*.

From Tls. 330 *to* 660 — one hundred blows heavy bamboo and three years' transportation 2500 *li*.

From Tls. 660 *to* 1000 — one hundred blows heavy bamboo and three years' transportation 3000 *li*.

Over Tls. 1000 — decapitation subject to revision.

If the money be made good within a year, the death penalty will be commuted a degree and lesser penalties executed; and if made good within two years, all penalties will be reduced a degree (?). If the amount be under Tls. 300 and made good within a year, treasury clerks *et hoc genus omne* will be excused — even though, as in the case of Liang Fên-yung 梁奮庸, they actually stole the money under their charge (H. A. H. L. vol. XIII. p. 1); and with them, in any case, if the money be refunded within a year, the penalty will be reduced a degree —

but until the money is refunded, the case is not dropped, and if the defaulter die, his sons will be imprisoned for the debt (H. A. H. L. vol. XIII. p. 2).

One of the worst features of the Code is the extreme severity with which officials are punished for losses to the Government over which they have practically no control (*v.* nearly any number Peking Gazette). If a person, under pressure of necessity, repairs a granary with the public funds at his disposal, without previous authority, he will be held guilty of misapplication of public funds; and if, on the contrary, such person fails to repair it, and the rice etc. is damaged, he will equally be held responsible for the loss by neglect. Certain instances are however justly enough visited with rigour: where, for example, with authority, a public building is repaired, and the materials employed are unserviceable or are used in a wasteful manner, the responsible officer becomes liable to a penalty for malversation varying with the estimated cost of the materials.

As regards the embezzlement or appropriation

by official *employés* of articles in their charge, the law runs that for the special provisions to apply the offender must be regularly in government employ and actually responsible for the article he annexes 任官人役專司主掌其事. If the offender, though temporarily acting as such, is not a regular official servant, and holds no appointment 並非任官人役又非奉官僉派祇, the ordinary law will apply.

SECTION II — FALSE PRETENCES — FRAUD — EXTORTION —
PERSONATION — CHEATING

FALSE PRETENCES — FRAUD — EXTORTION —
PERSONATION — CHEATING ETC.

False pretences. — To obtain property, whether public or private, by false pretences, is punished in the same manner as simple theft of public or private property — less branding. Where relationship operates, the effect is the same as in the case of ordinary theft.

In regard of public property, if two or more persons are intrusted therewith, and one of the

associates under false pretences obtains from the other or others a portion of the aforesaid property for his own use, the case will be treated as one of embezzlement of public property. An attempt to commit the offence involves two degrees less penalty than is above stated.

As with us the distinction between false pretences and larceny is often very fine.

Fraud. — This is subject to the same considerations, and punishable in the same way, as the obtaining property by false pretences. In the case of officials the offence is occasionally very heavily treated. So in a curious mixed case wherein a major and a lieutenant were concerned, and sentenced, the one to decapitation, the other to transportation for life, for making a false report of the loss of a war junk, with a view to escaping the burden of making good the cost — Tls. 1090 — for which they were liable, as it was lost owing to their carelessness. Both concerned would have been sentenced to capital punishment, but the lieutenant was

excused on the ground that he had made a true report in the first instance, and merely became a party to the false one substituted for it at the instigation of his superior.

Extortion or that favourite process known as 'squeezing' is as a rule rather heavily punishable. Persons who extort with threats the property of another incur one degree more than the ordinary penalty for theft, less the branding. For a junior to so extort property from a senior renders the former liable to the penalty attaching in ordinary cases of theft: and for a senior to so do from a junior renders him liable to a penalty for theft — with the full advantage of the customary mitigation.

The offence is not uncommonly practised by thieves and robbers. So to extort money from a person robbed, to enable the latter to recover his property, exposes the offender to the penalty of one hundred blows and transportation for life 匪徒明知竊情並不幫同鳴官反表裏爲奸逼令事主出錢贖賊但經得賊卽照強盜窩主律杖一百流三千里 (H.

A. H. L. vol. XVII. p. 11): and a thief demanding money for the restoration of property stolen by him incurs the same penalty (*id.*). A person who acts as middle-man, although personally not sharing the plunder, is also liable to a penalty under the law on this point. (*id.*).

An official who practices extortion is severely punished — that is in theory, for many are denounced, but comparatively few punished. For an official to extort, by way of loan, money or goods from those within his jurisdiction involves liability to a penalty varying as the estimated value of the money or goods extorted, according to the scale touching bribery for a lawful purpose: if, in such case, force be used, a penalty attaches according to the scale touching bribery for an unlawful purpose. A high official who extorts money is liable to a punishment two degrees heavier than an inferior official would incur under similar circumstances. A person in the family of an official who extorts money from those within the aforesaid official's jurisdiction will be liable to a penalty two degrees less than the official would have incurred under

similar circumstances. An important case touching extortion by officials is that of an official in the island of Hainan, who squeezed the Indians around his post, and was sentenced to military servitude on the frontiers — although he got but fifty dollars or so: a soldier who assisted the said official, and received a dollar for his share, was let off with a month's cangue and seventy blows. The Board herein laid down the important rule that in cases of 'squeezing' there are no principals and accessories — each is principal and to be dealt with according to the amount received (H. A. H. L. Supp. vol. XIII. p. 48).

Personation may be either for the purpose of obtaining goods or money or even mere personal consideration with others.

The most usual form is the personation of an official or of official rank: as to personate a commissioned officer 詐冒職官: to personate an official 假冒官職: to pretend to be an official to obtain some consideration in the

neighbourhood 假冒職官止圖鄉里光榮:
 to personate a policeman 假充名衙門兵役:
 to assume a button without right 假冒頂戴.
 To assume the character of an officer of government, or to pretend to have official authority to arrest a person, or to assume the name and style of any person actually in office, incurs a liability to a penalty of one hundred blows and three years' transportation. To personate as a near relative or an authorized agent of an official, for the purpose of obtaining some consideration in the neighbourhood (*supra*), entails one hundred blows. Where the personation is accompanied by circumstances of aggravation, involving — *e. g.* — forgery, the penalty is naturally severe. So whoever contrives a false deed or commission, and personates as an official, is liable to decapitation.

Another variety of the offence is that of personating an offender — which, if the fraud be discovered, renders the personator liable as an accessory in the second degree to the offence the actual offender has committed. But where relationship comes in mitigation may be

allowed — as where the personator was taking his elder brother's offence upon his shoulders (H. A. H. L. Supp. vol. XIII. p. 41). The practice of personating an offender is extremely common in the province of Kwangtung, and frequently occurs in cases involving capital punishment. The offence is, indeed, not infrequently condoned; for a magistrate, compelled by the system of responsibility for crime to execute or otherwise punish somebody or see himself executed or otherwise punished, will permit himself to allow personation.

Personation is also commonly played off on European residents, to whom all Chinese are much alike; but, in this case, the offence can hardly be said to exist — for it is rarely discovered.

Cheating and Swindling are ordinarily treated as a species of larceny, the gravity of the penalty varying with the amount of plunder 詐欺取財計賊間擬. Distinction must be drawn between the two offences — cheating 誑騙

is the obtaining property by fraud or deceit, swindling 局騙 is the obtaining property by fraud and conspiracy. A good example of cheating is that wherein articles are manufactured for sale which are not so strong durable or genuine as they are professed to be — *e. g.* silks, etc.

In the case of both offences there exist special statutes applying to various parts and trades. So of cheating at Peking, a special statute applies for the protection of the licensed brokers there against rascals setting up as their agents and causing merchants trouble 住京牙行若有光棍頂冒朋充霸開總行久占累商. An instance of the application of the statute is a case wherein an offender got cargoes into his possession, pretending he was the agent of a licensed broker, and passing worthless bills. For this, under the statute, a penalty of a month's cangue and military servitude upon the frontiers was adjudged.

Swindling cases often arise in connection with substitution (*v. Larceny*); and as to such, a special statute provides that when the amount

obtained by the swindlers in exercising this practice exceeds Tls. 120 in value the penalty shall be capital — a rule at first not extending to actual coin or notes, but now covering such cases also (P. A. S. P. vol. VIII. p. 27). So in the case of Ch'ien Chèng-yang 錢正楊, wherein a band of swindlers got a tradesman to their den, under pretence of selling him some silk. When he got there, the silk was said not to have arrived, and he was asked to exhibit his ability to pay for it. The coin was — as is the common custom — wrapped up; and during the inspection, the package dropped and the coin was scattered. Carefully picking the money up, the confederate lent the tradesman a piece of blue cloth to wrap it up in — and also offered him a cup of tea. Whilst enjoying the latter, a confederate abstracted the tradesman's package of coin, and substituted for it a similar package containing cash. The Provincial Authorities were at first of opinion that penal servitude for life was all they could give the principal, and three years apiece to the accomplices: but, on its being pointed out that the case came under

the special statute referred to, the principal was sentenced to strangulation (*id.*).

SECTION III — FORGERY

FORGERY

This is ordinarily merely looked upon as a species of larceny, and punished more or less severely, according to the amount of money or value of property involved. In certain heinous cases the treatment is exceptional and uncommonly severe: so to forge an Imperial Edict, if the forged instrument has been published, entails decapitation for all concerned. To forge ordinary official documents 偽造諸衙門印信 is looked upon as a kind of petty treason — the penalty varying according to the circumstances. So to forge a tax receipt, but making no use of the document, renders the forger liable to the mitigated punishment of three years' servitude and one hundred blows (H. A. H. L. Supp. vol. XIII. p. 56 and end of this article).

Again, forging an official grant of common is only visited with two years' servitude and ninety blows — the seal being unlike those really in use, and the benefit derivable from the forgery but small (*id.*). On the other hand, in the case of Ho Wên-k'uei 郝文奎, an offender who got a forged deed made, and raised a large amount thereon, was sentenced to military servitude for life as principal, and his associates were sentenced to penal servitude for three years (H. A. H. L. Supp. vol. XIII. p. 57): and again in the case of En Hui 恩惠, an offender who forged a series of deeds, with a view to raising a loan on some property, was sentenced to the same penalty as the foregoing principal (*id.*): and so, also, where a tax-gatherer forged tax receipts, and though the amount obtained thereby was trifling, a similar penalty was inflicted (*id.*). And with the forgery of a commission 造有憑劄 in probably like manner.

The forging of an official seal or signet 偽造關防印記 with intent to defraud is heavily punishable according to the amount involved. If over ten taels, it is decapitation for

the principal, and transportation for life for the accessories. If under the aforesaid amount, it is transportation for life for the principal, and transportation for three years for the accessories. An attempt to commit the above offence entails the aforesaid penalties reduced one degree.

Where relationship operates, in accordance with the ordinary rule in larceny, the ordinary penalties are mitigated (H. A. H. L. vol. XIII. p. 60)

The expression 描模 'to counterfeit' (as distinct from 偽造 'to forge') is often met with in this connection — as in the phrase 描模印信 'to counterfeit official documents'. Speaking with all submission, the question here is purely one of terms; and from the cases, 描模 is not so serious as 偽造.

SECTION IV — BURGLARY ETC. — ARSON

BURGLARY ETC.

This offence of itself can hardly be said to exist in China — it is a question of aggravation,

The breaking and entering a house with the intention of committing an offence therein is dependent upon whether the offence was or was not committed. If no offence be committed in the house, the mere breaking and entering is an aggravated form of simple trespass dependent upon the nature of the offence intended, the time, and the general circumstances. If an offence be committed in the house, the breaking and entering is a mere aggravation of the offence committed. So if a larceny be committed therein, it is commonly a form of robbery with violence: if a rape, it is an aggravated case of rape: if homicide, it is a case of homicide dependent upon the attendant circumstances. For the question of aggravation, the entry is in most cases an important point to determine: but it can hardly be said that such technicalities as an actual or constructive breaking are considered. Again, purely as a question of aggravation, to enter a house by night 夜無故入人家 is more serious than to do so by day. To enter a boat in which a person lives is the same as to enter a house.

The offence of *sacrilege* is viewed apart, and as an offence against Religion (*q. v.*).

ARSON

This includes the setting fire not only to buildings, but also to other objects. The offence is regarded variously; according to the nature of the act — whether it be intentional, or in some sort accidental; according to the nature of the object set fire to; according as to whether or not injury to life or limb resulted; and finally in connection with any circumstances for aggravation or mitigation.

As regards intentional arson, the intention will be gauged by reference to the circumstances; and if the fire be consequent on an illegal act, intention will be presumed (*v. also infra — Attempted Arson*).

As regards the object set fire to. If a person wilfully set fire to his own house, he will receive one hundred blows: if with damage to neighbouring houses, to one hundred blows and three years' transportation: if the case be aggravated by robbery, the penalty will be decapitation subject

to revision. Setting fire to stores, whether the stores be in a public or private building, and provided there be clear proof of guilt, is punishable with decapitation subject to revision for all concerned. Setting fire to the military stores in the dépôts on the frontiers is visited with decapitation and exposure of the head for the principal — while the offender's family will be liable for the amount of the damage done, and in default punishment. Setting fire to property in barns or to haystacks is punishable with one hundred blows and transportation to a distance of 3000 *li* — while if the offender has any property the value of that destroyed is to be made good out of it. For a person to set fire to his standing crops is the same as to set fire to his own house 該犯故燒自己禾穀與燒自己房屋無異 (H. A. H. L. Supp. vol. XIV. p. 45) — if injury to others ensue. To set fire to public buildings is a subject of aggravation — and an honorary portal is considered a public building (H. A. H. L. Supp. vol. XIV. p. 40).

As regards cases where there is resulting

injury to the person or loss of life the penalties are uniformly heavy. So in the case of resulting injury to the person, the principal will be sentenced to decapitation subject to revision, the accomplices to military servitude on the frontiers, and persons induced to assist to one hundred blows and three years' transportation; and in the case of resulting loss of life, the principal will be sentenced to decapitation, and the accomplices to decapitation subject to revision. Moreover, where life is lost, it is immaterial whether the deceased was within a building or structure set fire to or not; as in a case wherein an offender maliciously set fire to a wood-stack, and the fire spreading to the cover on the hillside, a grass-cutter got burnt thereby — for which the full penalty was adjudged.

If the fire be put out, and the neighbours assist thereat at expense of danger to life or limb, but neither they nor anyone else is actually injured, the principal will receive two months' cangue and military servitude for a period, and the accomplices three months' cangue and one hundred blows.

As regards a fire arising from accident, the Court considers the proximate cause of the accident. There are accidents and accidents. A person maliciously sets fire to a building, intending to burn only that building: but the fire spreads until half a town is consumed — the offender will not be allowed to plead that he only intended to destroy the one building, and that the destruction of the others was accidental. The circumstance is not one for extenuation, but for aggravation. So if a person maliciously sets fire to his tailor's, and the fire consumes also an adjacent honorary portal, the case will be aggravated both by reason of the additional damage, and by reason that the damage was done to a public monument.

Again where the accident happened during the commission of another offence, the offender will be punished for arson aggravated by the additional offence. Thus if the offence be larceny, the case will come under the clause "Arson "with a view to personal advantage —" and this, apparently, no matter how accidentally the fire occurred. So in a case wherein a thief,

lighting his pipe in a wood-shed where he was plundering, was pounced upon by the master of the house — and in the ensuing scuffle the pipe was knocked out of the offender's hand, the slavey set on fire and the house burnt. Here according to the Board, the fire was traceable to the offender's intent to steal, and the case aggravated to the highest degree: to punish the offender for larceny was considered insufficient, and the offence was brought in as the capital offence of arson with a view to personal advantage — with (however) *circumstances attenuantes* 照惡徒謀財放火已經燒燬爲首斬候例量減一等 — and the penalty of one hundred blows and transportation for life 3000 *li* distance adjudged (H. A. H. L. Supp. vol. XIV. p. 41). And similarly so in the case of Yang Erh 楊二, who having committed an act of larceny, was running away, and while doing so, dropped a slow-match within the house where he had committed his offence, and thereby set the house on fire (H. A. H. L. Supp. vol. XIV. p. 42). Indeed it seems to be the general ruling, that if a fire can be traced to a person

who commits an act of larceny he will be held responsible under the above clause; and under exceptional conditions, as in the above case, the penalty will be mitigated.

And the rule for mitigation also applies apparently, and similarly exceptionally, in the case of fire resultant upon another offence.

Lastly there is the case of accident pure and simple. This is by no means in general a consideration for complete excuse — on the contrary it is punishable. A person who accidentally sets fire to his own house is liable to a *minimum* punishment of forty blows — and if the fire spread to other buildings to fifty blows. And so also with an increasing penalty in the case of accidentally firing honorary portals, monuments, public residences, etc. etc. Where the person or persons involved were under some special liability for the safety of the object set fire to, the case is more obvious. So in the case of a junk forming one of the rice convoy, wherein a sudden squall arising, the mast shivered, and the sail dropping on to a stove at which the man-at-the-wheel was cooking his supper caused the

vessel to catch fire. For this the captain of the junk was sentenced to eighty blows, and the official in charge of the convoy to a month's cangue — and be it noted, not for mere liability for simple damage sustained, but for arson (H. A. H. L. Supp. vol. XIV. p. 40).

Attempted Arson. — Though a person has merely attempted the offence, he may be punished with a mitigated penalty for malicious arson — and the intent to attempt the offence will in some cases be inferred. So in an instance where the offender had thrown a bomb with a lighted match attached into a shop, with a view of frightening the proprietor, and was sentenced to a mitigated penalty of one hundred blows and three years' transportation for malicious arson — although no damage ensued (H. A. H. L. Supp. vol. XIV. p. 41).

CHAPTER XIII

OFFENCES AGAINST THE PEACE

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

The offences dealt with herein as Offences against the Peace are, on the whole, familiar to the English student in this connection: but the mode of consideration differs widely, and further, to meet special conditions in certain parts, special treatment has been devised in place of the ordinary law on the point. Indeed the local authorities may be said to possess very considerable extraordinary powers for the preservation of the public peace.

As regards the ordinary mode of legal treatment, the rules touching unlawful assemblages, rout,

and riot, are meagre — but somewhat approximate to English law. The most interesting view is undoubtedly the constitutional. Have the Chinese a right to assemble without molestation? This right exists within certain limits — and not such narrow limits as at first sight appears to be the case. For, as regards the numbers, though three is indeed considered a crowd (*z.* p. 452) where the assemblage is of such a nature as is sufficient to inspire an ordinary Chinaman with fear (*id.*), yet if the assemblage is not of that character the term will not apply. Accordingly the question is very largely one of construction. It is not then *merely* as regards numbers that any limit has been fixed, and inspection of the law will show that the manner of assemblage, the conduct of those assembled, and their equipment are primary considerations — and any or all of these points proved, the question of numbers becomes important. Again as regards the term ‘equanimity of an ordinary Chinaman’ — is not this a question purely of construction? But who can possibly gauge such an equanimity?

As regards affray, the term differs considerably from our view — having a wider signification, and being closely involved in its very essence with other offences.

In respect of the special treatment of Offences against the Peace, it may be noted that clan fights (*q. v.*) occur especially in Kwangtung and Fukien, are the direct result of the clan system (*v. Introduction*), and cause perpetual turbulence and often great loss of life. Many allusions to these occurrences appear in the Peking Gazette, and the evil seems to be an organised one, not capable of effective repression by the administration. Even where a case attains to judicial process, the employment of false witnesses, and assumption of responsibility by the whole clan, renders it a hard matter to reach a fair issue.

SECTION II — ORDINARY TREATMENT — RIOT ETC. — AFFRAY

ORDINARY TREATMENT

RIOT ETC.

Distinction is drawn in regard of *unlawful assemblages* and *riots* as to the number of those engaged, the specific purpose for which those comprising an assembly have engaged, whether the members thereof are armed or not, the manner of assembling, the actual injury or damage done, and the place wherein the assemblage or riot takes place. The primary point is however the assembling; this proven, the other considerations are suggestions for aggravation or mitigation as the case may be. A riot is merely considered an aggravation of the offence of unlawfully assembling.

A crowd assembling together in such manner as to disturb the equanimity of an ordinary Chinaman is liable to summary justice. Three is a crowd 衆 (H. A. H. L. vol. VIII. p. 50). It is immaterial that each individual member of the crowd behaved quietly and in accordance with law 安靜守法.

If an unarmed mob to the number of forty or fifty assemble confusedly together, and the members thereof then proceed to commit acts calculated to inspire fear in the mind of an ordinary Chinaman, the aforesaid members will be treated as ruffians 光棍 or rowdies 棍徒 — and the principals sentenced to immediate decapitation, and the minor offenders to strangulation; and a mob of lesser numbers, but armed and resisting the authorities, will be similarly treated. It seems, however, that if the mob had some show of reason on its side, the case may be treated differently — with much mitigation: as in the case of Wang Yu-shan 王佑山 and others — who behaved turbulently in endeavouring to recover land, which had once belonged to them, and since been flooded (H. A. H. L. vol. XVI. p. 20).

Where persons assemble in the public highways, with a view to forcibly oppose an official who has been deputed for some duty, such as the maintenance of the peace, the principal is liable to a penalty of 100 blows and transportation for life to a distance of 3000 *li*.

If in such case the aforesaid official be wounded, the principal will be sentenced to strangulation subject to revision. Where in regard of the latter point the mob numbered ten or more, or regardless of the number, if the aforesaid official be killed, the principal or principals become liable to decapitation, and accessories to one degree less punishment.

AFFRAY 鬪毆

This term is not used in our sense, and includes both chance and premeditated encounters. It is not really considered so much as an offence against the public — though punishable as such — but its true essence is in the fighting and in the injury arising therefrom. Of itself it is barely treated in Chinese law books, and its importance seems to lie in considerations arising out of it — conveniently, if illogically, dealt with in this place.

(a) And first of killing in affray, a portion of the law intimately connected with ordinary homicide on the one hand and the law of principal and accomplice on the other, but from the fact

of the killing taking place in affray, possessing strong individual features of its own.

In premeditated fatal affrays, if the originator of the affair takes part in it and inflicts serious injury on the deceased he will be held principally responsible: but if he has not done serious injury to the deceased, and the fatal wound can be traced to someone else, the latter will be held responsible as principal, and the originator only so in the second degree. The responsibility still attaches to the originator, if it cannot be ascertained who struck the fatal blow; and even though the originator be not capitally responsible, he will be sentenced to life transportation as against a term only for an accomplice (H. A. H. L. vol. XXX. p. 1).

If the affray was unpremeditated, the person by whom it was commenced will be held to be the principal. Where several serious injuries are inflicted, and the victim dies on the spot, the person striking the last fatal blow may be held responsible (*id.*): but the mere fact of striking the last blow does not necessarily make the striker principal, if others can be shown to have inflicted

the fatal injuries, and that done by the striker of the last blow was comparatively slight (H. A. H. L. vol. XXX. p. 7) — for the rule only applies when it cannot really be distinguished who struck the most serious blow (H. A. H. L. vol. XXX. p. 8).

For a person to say during an affray that he will do for a man is evidence of active participation (*v.* case of Yang Chêng-hsiang 楊正享 H. A. H. L. vol. II. p. 23).

It is an aggravation of the offence that an offender had no personal interest in the case; but it would seem, even though knives be used, that such person will merely be sentenced to strangulation subject to revision, if there was no deliberate intention to kill (H. A. H. L. vol. XXX. p. 1).

It is an aggravation that a number of other people were asked to help, and the offence of the person so asking will be the more severely visited in ratio with the number of lives lost; and if two persons belonging to the same family are killed the sentence will be strangulation, and if three, decapitation without appeal — the actual perpetrators of the homicide being sentenced to

strangulation subject to revision (H. A. H. L. vol. XXX. p. 12).

It is also an aggravation that a person kill three others in an affray, and although not the principal his sentence will be strangulation without revision (H. A. H. L. vol. XXX. p. 14).

As regards mitigation, if the person killed was not the person the originator intended to beat or one of his relatives, and the friends of the originator killed him by mistake, the responsibility of the originator is reduced a degree (H. A. H. L. vol. XXX. p. 15). Again the capital sentence will be commuted to transportation for life, if the wound though in a dangerous spot is in itself insignificant, and the victim dies from taking cold in or through it ten days or more after the wound was inflicted. In a case, however, where a man was knocked on the head with a rolling-pin and the bone laid bare, the Board declared that the case did not come within the statute — though the victim lingered fourteen days, and died of cold then (H. A. H. L. vol. XLIV. p. 90). The rule does not apply where the wound was in the first case severe.

As regards the effect of relationship on the penalty in fatal affrays. If a relative of a person killed in a fight then and there beats to death the person responsible for the aforesaid homicide, the capital sentence will be commuted to military servitude — but the relationship must be by blood and not simply by marriage (H. A. H. L. vol. XXX. p. 25).

If in a fight between two families, the respective murderers on either side are relatives of the men killed upon their side, the capital sentence will be commuted to military servitude (H. A. H. L. vol. XXX. pp. 19—20): but the killing must be in the same affray, and not on two fights arising, though it may be out of the same affair (H. A. H. L. vol. XXX. p. 36).

(b) Secondly of the use of fire-arms in affray.

If a person discharge a gun in the course of an affray, intent will be assumed, and the firer will be sentenced to decapitation if he kill anyone (H. A. H. L. vol. XXX. p. 43). And the discharge will be held to have occurred intentionally, though done in self-defence (H.

A. H. L. vol. XXX. p. 46). And if any abuse has been exchanged, the case will be one of killing in affray, whether the weapon went off by the act of its possessor or his antagonist; as in the rather hard case of Tsêng Liang-ming 曾亮明, who interfering to stop a row, interchanged some angry words with one of the parties, who thereon struck the intervener with a stick, and the latter article touching a gun that the intervener was carrying, caused it to explode and kill the striker (H. A. H. L. vol. XXX. p. 48: *v. also Homicide — Fire-arms*).

SECTION III — SPECIAL TREATMENT — CLAN FIGHTS

SPECIAL TREATMENT

CLAN FIGHTS IN SOUTH CHINA

In the south of China special provision is made for the repression of the clan fights which flourish there, and care has to be taken in dealing with affrays to settle whether they come under these special clauses or not. That

there are a number of people engaged, and that one side belong to one part of the country and the other side to another, does not necessarily constitute a clan fight. The points to determine are whether there was a feud to start with, whether the fight was premeditated, whether men were hired to take part in it (there being regular professional fighters — free-lances — open to engagement), and whether the factions went armed to the field. Where it appears from these facts that it was a deliberate clan fight and not a chance or ordinary affair, the organiser will be held responsible as well as those actually taking part in the fight — the punishment being regulated by the number of men there were engaged upon the side of the organiser, and also by the number killed upon the other side. Nor are *both* sides to be brought under the clauses, unless the fight was prearranged *between* them — the attacking side ordinarily coming under the operation of the special statute.

To kill in a clan fight is styled 糾衆械鬪 毆殺.

The following case illustrates the distinction between a clan fight and an ordinary affray.

A hill held in common by certain villagers was secretly — and of course illegally — leased by one of the villagers to a man Chang, who planted it with young pines, and thereby caused protests from a family named Tsao. Finding the young pines pulled up shortly afterwards, Chang naturally suspected that the mischief had been done by the Tsaos, and with three of his relatives armed with swords and bludgeons proceeded to the gate of the Tsao family — and with much abuse challenged them to come forth. The Tsaos, eight in number, likewise armed with swords, promptly came out to argue the matter — and a fight ensuing, the four Changs were killed by four of the Tsaos.

As the case merely originated in the defence of their gate by the Tsaos, the affair could not be considered as an ordinary clan fight; and it was held that the case was made up of four distinct affrays, for which each principal was responsible only for his share — and the

four Tsaos who were acknowledged to have inflicted the most serious wounds on the four Changs were sentenced to strangulation subject to revision, while two other Tsaos were sentenced to transportation for wounding with sharp instruments, and the two remaining set free.

CHAPTER XIV

OFFENCES AGAINST THE STATE

SECTION I -- GENERAL CONSIDERATION

GENERAL CONSIDERATION

The distinction between offences against the State and other groups of offences is not always clearly marked. Offences against Religion are, in a manner — and in especial in certain cases — offences against the State; so are offences against Justice, and offences against the Peace. Even as contrasted with offences against the Individual, the distinction is not always clear. So of larceny, a small band of robbers may be viewed by the Government merely as a group of offenders guilty of offences against the Individual; but where the

band increases in numbers and resources — is, in short, an organization capable of defying the State — the Government naturally views their actions with the more jealous severity attaching to an offence against the State.

Offences against the State are capable of mental classification into three categories. Firstly, cases where the person of the Head of the State is directly and primarily placed in danger. Secondly, cases where the existence of the State is directly and primarily imperilled, though the person of the Head thereof is not directly and primarily placed in danger — *e. g.* rebellion, sedition. Thirdly, cases where the existence of the State is indirectly imperilled, but not being a direct and primary source of danger either to the person of the Head of the State or to the existence of the State — *e. g.* piracy, coining; for all such offences tend to destroy proper confidence in the High Powers.

The offences under this topic are interesting, inasmuch as they indicate the general desire to reconcile two principles — supremacy of

the state and absence of tyranny. A further peculiarity is that though the Head of the state is constitutionally personally supreme, the essence of the law on the point, while fully recognising this personal supremacy, is to conserve the state for the benefit of the community. It may be added that this peculiarity is completely in accordance with the general principles of the system, and is not inconsistent with the well-known truth that the reigning Emperor is absolute: for, as has been shown by a distinguished writer, His Imperial Majesty reigns not by divine right, but only so long as can be demonstrated that the government is beneficial to the general community. This latter point is the kernel of that much debated phrase *t'ien tao* 天道 — by some translated 'rule of heaven', perhaps more efficiently, simply 'rectitude'.

The consideration of these offences is in general simple and straightforward — though a tendency may be remarked to entangle by variety.

SECTION II — TREASON ETC. — PIRACY — SEDITION

TREASON ETC.

The offence of *high treason* 謀叛大逆 is of two varieties; the first includes all attempts to subvert the established government; the second includes attempts to kill the Sovereign, attempts to destroy the palace in which he may be residing, or the Imperial ancestral temple, or the tombs of his Imperial ancestors. By construction, offences not falling strictly within this definition may also be included.

All persons convicted of having taken part in this offence, whether as principals or as accessories, are liable to the slicing process — and their property is forfeited to the State. Moreover not only does the extreme penalty attach to the actual parties in the offence, but all male relations in the first degree over the age of sixteen will be decapitated and their heads exposed: and similar treatment will be extended to all male relations, however distant, and over the age of sixteen, who were

residing under the same roof with the traitor or traitors at the time of the commission of the offence. The wives of the traitor, and his children and grandchildren under sixteen years of age, will be given to meritorious banner-men in and around certain capital cities as slaves — unless they have passed into another family by adoption or marriage, or even if they have been sold, when they will escape any consequences (H. A. H. L. vol. XII. p. 31). The wife of an elder brother will not be involved (*id.*). In respect of certain classes of traitors — *e. g.* Christians — the families are to be sent to the frontier posts, as it is inexpedient that they should be quartered in large numbers in the capital cities. Small children are to accompany their mothers. If the masters to whom the families have been assigned find them useless, and refuse to be troubled with them, they are to be sent to the Amoor or to the Pamirs as slaves (H. A. H. L. vol. XII. p. 34).

Rebellion 謀叛. — This offence is defined as the renunciation of allegiance, and all

parties to the offence — whether principals or accessories — are liable to decapitation and exposure of the head: parents, grandparents, brothers, and grandchildren of the offenders will be liable to transportation for life: wives and children will be sent into slavery. In grave cases of rebellion, the sons are to be retained in prison, and on attaining the age of sixteen they are to be castrated (*q. v.*). Nor will the law allow an octogenarian and bedridden mother of a rebel to commute by fine her sentence of slavery (H. A. H. L. vol. XII. p. 35). Relatives may be kept in prison for twenty years awaiting confrontation with escaped rebels — although themselves be guiltless (*id.*).

The offence of rebellion, it would seem, cannot be forgiven if any overt act in furtherance thereof has been committed, though under compulsion (H. A. H. L. vol. XII. p. 44).

Misprision of treason. — The bare knowledge or concealment of high treason is punishable with transportation for life: the bare knowledge or concealment of rebellion is punishable with transportation for a term.

PIRACY

Pirates with us are rovers on the sea, but in China there are land pirates also — bands of robbers living on the islands or those parts of the coast where law is only represented by the casual presence of occasional constables, or desperadoes, who do perhaps a little fishing or occasional agriculture for their living, but combine illegal courses with their more legitimate occupations, and plunder a passing junk or wealthy pawnshop in the neighbouring towns.

The technical general term for a sea pirate is 洋盜 : but the more comprehensive term 强盜 is also commonly applied.

The law regarding piracy is naturally severe, special provision being made for their speedy punishment when they fall within the clutches of the Courts. The principal or real pirates 正盜 are to be instantly beheaded near the scene of their offences, and their heads exposed as an example : and if they have resisted the troops sent after them, the penalty is lingering death. The accessories are not so hardly dealt

with. So in the case of Mi Yu-fu 宓有孚, where the principals who boarded a vessel and plundered it were executed, but a certain Wan Ch'êng 萬成, as an accessory, was sentenced merely to frontier slavery; and this although he appeared to have willingly joined the principal pirates in chasing the vessel boarded, to have boarded the said vessel, to have assisted in transporting the plunder to the pirates' boat, to have shared the proceeds, and to have aggravated his offence by keeping out of the way for some ten years, and blacking the eye of the policeman by whom he was ultimately arrested. Those only are considered as principal or real pirates who use violence, or who go below to rummage for plunder, or who take part in frightening the persons robbed (H. A. H. L. vol. XIV. p. 54). The case of Wang Yu-shêng 王有升 and others affords also a good illustration of the law, and lays down further definitions on the point. Therein, the principal pirates were executed; nineteen men, for taking part in carrying off the plunder, were sentenced to be branded and

sent to frontier slavery; and two men and a youth retained on board the pirate vessel for the recreation of the crew, and whose part in the proceedings appears to have been purely passive — or perhaps rather impurely passive — were sentenced to transportation and one hundred blows. It was also laid down that where the culprits are merely charged with having been compelled to lend their services on board a pirate as sailors or clerks, cooks etc., they shall only be sentenced to three years' transportation: and if the only charge is presence on board the pirate vessel against their will, or even if the culprits have rendered service against their will, the case is to be dismissed, and the offenders sent back to their homes.

To hold commerce with pirates 接濟洋盜 is rigorously treated.

It is a capital offence to provision professed pirates; but supplying them with water or water-melons or cabbages or condiments is not held to constitute the full offence, and is punished, according to the gravity of the case,

with military servitude or transportation for life (H. A. H. L. vol. XIV. p. 62).

To buy plunder from pirates is punishable with one hundred blows and transportation for three years for a first offence, military servitude for a second, and frontier slavery for a third (H. A. H. L. vol. XIV. p. 58).

The Government has found however, that the repression of piracy by preventive measures is a difficult task, and sundry paternal provisions have been made from time to time — with a view to eradicate the offence by kindly concession. Thus it is laid down that pirates who have given themselves up and have only twice offended may commute their due punishment by military service. If however, after they have enlisted, they run away, the deserters are to be sent to Siberia as slaves; but even such deserters who of their own free will return to their duty are allowed to expiate their offence with one hundred blows and one month's cangue. If the offenders run away before their enlistment, so as to avoid it, they are merely given eighty blows and one month's

cangue. If the offenders are not amenable to discipline, they incur the sentence of perpetual imprisonment; but a casual or petty offence does not come within this provision (H. A. H. L. vol. XIV. p. 65).

The offence is even entirely excused under another provision, whereby if pirates give themselves up, and make a clean breast of all that they have done rendering them liable to punishment, they will be pardoned in respect of all previous offences not capital — and even the latter are not to be too particularly enquired into, if there be no private prosecutor to be appeased (H. A. H. L. vol. XIV. p. 68). But the confession must be full, and the pardon will not cover more than the culprit divulges.

In conclusion, it may be added, that this offence is generally considered in Chinese law under the head of larceny.

SEDITION

As with us the term is hardly to be defined, but is in fact any practice by word or deed or writing calculated to subvert the foundations

of the realm or of society and disturbing the tranquillity thereof. In a sense, the term is wider than in English law — including not only offences against the state *per se*, but offences against the state as the guardian of the fundamental rules which regulate the whole community.

To indicate the variety and range of the offence, it seems to be considered seditious to use artful words and provoke one as yet innocent of a capital offence to commit some such grave offence as murder: on the other hand it is sedition for a group of officers to intrigue together and impede the Government.

The offence in its gravest character is punishable by decapitation certain. To disseminate seditious handbills entails decapitation certain for the principals, and subject to revision for accessories — and persons who print, distribute, or shout such in the streets are liable as accessories.

Most commonly the offence of sedition is considered in relation with another, such as the foundation of unlawful societies (*infra*);

and not a few points on the subject are dealt with under the Code clause relating to witchcraft.

Unlawful societies. — Communists, Socialists etc., would not have a pleasant time in China. Brotherhoods where all are equal and the leader is chosen irrespective of his age — where, as they put it, a young man is head, and no regard is paid to age — are considered subversive of the foundations of society. Distinction is drawn in regard of the number of those forming the society: if the brotherhood number forty or more members, the elder brother is liable to capital punishment without revision, and the other brothers to transportation for life to the desolate regions of Canton Yunnan etc.; if the brotherhood number less than forty members, the elder brother will be sentenced capitally, and the others to transportation for life and servitude 3000 *li* distance (P. A. S. P. vol. VII. p. 1). The law on the point is also applicable to members of illegal sects.

Secret societies flourish however in China,

though repressed with severity when occasion offers: they are in fact the leading source of irritation to the Government from within (*v.* nearly any number of the *Peking Gazette*).

Members of a secret society or an illegal sect are phrased 邪教會匪, and a conspiracy of persons banded together by oath 聚衆結盟.

SECTION III — MAKING ETC. ARMS ETC. — UNLAWFUL
DEALINGS WITH PUBLIC STORES ETC.

MAKING, POSSESSING, AND TRAFFICKING IN
ARMS AND AMMUNITION

The law relating to this point is, on the whole, fairly severe, and varies, in general, according to the nature of the arms or ammunition.

And first of fire-arms. Distinction is made between weapons that carry merely shot and those that carry bullets. So in a well-known

case where the maker of some ten fowling pieces was sentenced to one hundred blows, and another person for purchasing and trying one of them to forty blows (H. A. H. L. vol. XI. p. 52). Had the weapons in this case been ordinary matchlocks, the maker would have been sentenced to the cangue and one hundred blows for the first weapon made, and one degree more punishment for each additional conviction — but as it was clearly shown that the weapons could only carry shot, the cangue was remitted. The guns themselves were however seized and destroyed, and the purchase money confiscated.

The making and possessing cannon is seemingly treated a degree more severely than is the case with matchlocks. Gingalls are to be considered as cannon (H. A. H. L. vol. XI. p. 59).

The illicit manufacture of arms and traffic therein is, in spite of the law thereon, common. It seems that the stated penalties are not heavy enough, and extraordinary measures are announced from time to time; usually the

proclamations commence by offering the value of arms voluntarily surrendered, and in default thereof prescribe *seriatim* heavy penalties (H. A. H. L. vol. XI. p. 60).

Persons requiring fire-arms for their protection against wild beasts are accorded exceptional treatment, and on making application can, if there be good ground for their request, obtain permission to possess and use fire-arms, — the weapon being registered, marked with the name of the possessor, and periodically inspected (H. A. H. L. vol. XI. p. 59).

Moreover the law as to fire-arms does not apply to Manchuria — the Emperor Taokuang having been of opinion that it was a very desirable thing for Manchus to make weapons, and holding it was absurd to say that the people were not to possess fire-arms, on which, living as they did by hunting, their livelihood depended (H. A. H. L. vol. XI. p. 53).

As regards gunpowder, etc. Making gunpowder for sale, though none has actually been sold, renders the guilty party liable to one degree less penalty than he would have

incurred had he sold it (H. A. H. L. vol. XI. p. 61). Selling gunpowder to salt smugglers is punishable with military servitude on the frontiers. Selling over 50 catties (about 70 lbs.) of sulphur and under 100 catties is visited with one hundred blows and three years' transportation. Slow matches may be manufactured and sold for legitimate purposes freely (H. A. H. L. vol. XI. p. 56).

As regards mere articles of military equipment — such as armour, shields, cartridge boxes, powder flasks, flags, uniforms, etc. — the simple possession of one such article is punishable with eighty blows; and the penalty is increased a degree for each additional article. The manufacture of the above articles is one degree more severely punished than the possession thereof. In no case, however, is the penalty to exceed one hundred blows and transportation for life to 3000 *li* distance.

UNLAWFUL DEALINGS WITH PUBLIC STORES AND PROPERTY

Such offences commonly arise in connection

with the receipt and issue of stores from the public treasuries and storehouses.

An official who receives goods of an inferior quality, when he should have received superior goods, will be liable to the ordinary penalty for embezzlement of public property, but proportioned in accordance with the excess in value of the superior over the inferior goods: and a similar *ratio* is adopted where fresh goods are improperly issued instead of those in stock. Where an official who has charge of public clothes, utensils, and the like, employs or lends the same for private purposes, a flogging is incurred; and furthermore, if not returned within ten days, the article so lent or employed must be exactly replaced.

Curious instances often arise in respect of the rations issued to bannermen. So when a bannerman dies, the relations sometimes forget to report the death, and send some one to represent the deceased at the time when the rations are issued. Moreover, where the issuers of the rations are aware of the circumstances, an arrangement is usually come to, by which

the relatives agree to take short weight — the issuers taking the remainder.

SECTION IV — POSTAL OFFENCES — COINAGE OFFENCES

POSTAL OFFENCES

The Post Office in China not being a general post, but existing solely for the conveyance of official matter (there being numerous private agencies for private matter), the law on the point, though somewhat bulky, concerns in the main the administration of the department. Private matter is, in fact, frequently carried — but by law must not exceed a certain limit by weight: taking such private matter is a favour, and it does not appear that an official who detains or steals or destroys such will be punished otherwise than an offence committed in his private capacity — the penalty will not be exceptional, if indeed any penalty be inflicted at all. On the other hand, delay

or want of vigilance in the conveyance of official matter is liable to be visited by heavy penalties; and *a fortiori* the destruction or interception of such matter.

Appropriation of official envelopes for private purposes. — Special correspondents would have hard times in China; so in the case of Li Chia-shan 李嘉山, who desirous of gratifying the want of the provinces for early copies of the Imperial (Peking) Gazette, begged, borrowed and stole official envelopes in which he forwarded them — everyone concerned coming more or less to grief in consequence, although the Board saw that there was some excuse (H. A. H. L. vol. LI. p. 3. — *v. also* p. 412 *et seq.*).

COINAGE OFFENCES

Such offences are, on the whole, treated very severely. To counterfeit the coin of the realm — copper cash 私鑄銅錢 — is punishable by strangulation; and accessories are liable to one degree less. To manufacture bad sycee or false dollars is less gravely

considered — three years' penal servitude only (H. A. H. L. Supp. vol. XIII. p. 62): to cast iron, zinc, tin, or leaden cash is held a similar offence with the latter. The above penalties are, however, subject to aggravation or mitigation according to the amount represented by the false coin.

As regards the frequent offence of washing or alloying a base metal with a precious metal, the former treatment is more gravely considered than the latter; so to alloy lead and silver to the extent of even 80% of the former metal is regarded as a fit case for mitigation.

To clip or file the coin of the realm is punishable with one hundred blows.

The primary offence is considered to have been to some extent committed if preparations, even in slight measure, have been made: so even to have made a mould is considered coining. The owner of the premises wherein the offence took place is liable in a lesser degree; and so also are the ward elders and neighbours — it seems to be a legal (and not merely a

society) duty in China for one neighbour to have a complete knowledge as to the state of another's exchequer. Simple workmen hired to blow the bellows are merely bamboosed.

As regards the circulation of the bad coin, the offence is heavily punishable, and varies according to the amount involved. A person will be considered to have circulated bad coin, who has merely bought such with a view to the purpose (H. A. H. L. vol. LI. p. 34) — although the coin has not passed out of his hands; and running such coin past the barriers, or even simply hiding it away, incurs a similar liability. Merely stringing together bad cash which has been received in the way of business is punishable with a mitigated penalty (*id.*).

SECTION V — OFFENCES BY OFFICIALS — MISCELLANEOUS OFFENCES

OFFENCES BY OFFICIALS

Ordinary offences — *e. g.* larceny — committed by officials form a consideration in the general law. The nature of the offence is the same, but the position of the offender introduces certain variations. A cursory view of the Code will show however that many clauses are set apart for offences by magistrates, offences by civil officials, offences by military officials, etc. These offences, for the most part, relate to the failure to discharge certain special obligations to the State. So it is an heinous offence for a high official to appoint another official on his own authority: it is an heinous offence to recommend as deserving of high promotion one who is not so deserving: it is a grave offence to appoint supernumerary officials without leave, to neglect making proper reports, or to tamper with an official seal. Bare mention of such offences is sufficient: two or three somewhat striking points may however be noted.

Insubordination etc. — It is a high offence for an officer, military or civil, to desert his post — punished capitally if he runs away because he has committed an offence, and with transportation to Siberia if it be merely for his own purposes. To simply leave a post without permission is not looked upon as desertion therefrom, and is simply visited with three years' transportation. A merely expectant official, though not allowed to go and come as he likes, will not be treated in this connection with the same severity as the holder of a substantive appointment (H. A. H. L. vol. V. pp. 73—75). And so, furthermore, in still lesser degree, as regards very minor officials in respect of places where they are “on duty” or “on guard” 任 〇 〇 該 班.

To strike a commanding officer, or an officer under whom the assailant is for the time being serving, is visited with immediate decapitation : but if officials or superior officers bring insult on themselves by want of proper dignity, or conduct unbecoming their position, the case will be dealt with in accordance with the

circumstances (H. A. H. L. vol. XXXVIII. pp. 17—20). So if an official is forgetful of what is becoming a gentleman of his position **不思恪守禮法**, or is absolutely ignorant of the necessary amenities **不知恪守禮法**.

Excess of zeal. — It is considered desirable that officials should not betray too unseemly an activity in the execution of their duties. So a Customs officer who was somewhat officious, was sentenced to one hundred blows and a month's cangue (H. A. H. L. vol. X. p. 51). Many examples of the kind are to be found in the pages of the Peking Gazette.

Bribery. — Officials, whether civil or military, who accept a bribe, be it for a lawful or unlawful purpose, are liable to a penalty varying according as the object was lawful or unlawful, and graduated according to a fixed scale — ranging from the infliction of a certain number of blows of the bamboo to a capital penalty. In addition to a penalty, loss of rank and office is also entailed. It is considered bribery within the meaning of the above, if an official, although not bribed in the first instance,

afterwards receives a sum by way of reward for his conduct of a transaction.

An agreement to accept a bribe is one degree less serious an offence than actual receipt thereof — but in no case entails a capital penalty.

Impressment for private purposes. — An officer who exercises magisterial functions, or a superintendent of public works, who impresses for his private objects those within his jurisdiction, will be liable to a penalty of a certain number of blows, varying with the number of those employed.

So also of officials who compel private persons to carry their sedan chairs.

MISCELLANEOUS OFFENCES

Encroachment on the soil. — To encroach on the public highways 侵占街道, roads, squares, etc., is punishable with sixty blows of the bamboo: the ground so encroached on must furthermore be restored to its original state. To encroach on the roadway by erecting a buttress to support a wall subjects the offender

to sixty blows and one month's cangue (H. A. H. L. vol. LX. p. 65).

Damaging river embankments: cutting dykes etc. — Distinction is herein drawn between such damage to great rivers and the larger waterways, and such damage to small rivers, creeks, ponds, etc.

Further points arise from the fact of resulting damage, loss of life, and the general effects of the offence.

Where bodily injury or death results to any person, the case is treated one degree less severely than killing or wounding in affray. Where a person cut a private dyke, with the result that much property was injured and fourteen lives lost, a penalty of three months' cangue and military servitude for life was adjudged (H. A. H. L. vol. LX. p. 61).

Intramural interment. — This is forbidden in the Capital, and with so much particularity, that to even convey a corpse through the city is punishable. So a traveller merely passing through, with the body of his deceased spouse packed up in one of his boxes, was

punished with one hundred blows (H. A. H. L. Supp. vol. VII. p. 31).

Treasure-Trove. — The term seems to have a wider signification than in English law, and includes (with a few exceptions noticed *infra*) all lost or abandoned property found in or upon the earth.

In regard of property found by and on the wayside the correct course is to deliver up the find within a given time to the local magistrate. If the property is public, it will be definitely retained: if the property is private, it will be retained for a specified time — and if the owner appears within the period, half the property will be returned to him, and half may be retained by the finder. If the owner does not appear within the given period, the property will go *in toto* to the finder.

The above rules also apply to property found *in* the ground, with the exception of ancient utensils, bells, official seals, and such like — which must within a given period be delivered to the Authorities (*v. also* H. A. H. L. vol. X. p. 57).

CHAPTER XV

OFFENCES AGAINST JUSTICE

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

From one view, offences against Justice are in China in their very essence offences against the State. From the legal point of view, however, the peculiar element in all these offences is detriment (with a spice of rash contempt involved) to the law *per se*, and not to the State nor to the Individual. Nevertheless it may easily happen that an offence distinctly coming within this topic may be ranged and punished under a clause of greater stringency than at first sight applies — so contempt of Court might conceivably be considered treasonable or seditious. There is, in

fact, a good deal of strained construction in connection with this portion of the law.

Offences against Justice, as tending to shake confidence in the law are, on the whole, viewed with a very natural jealous severity — “so as “to give confidence in the law” 以成信讞 and “to make manifest its majesty” 以示懲儆.

The offences enumerated herein are mostly familiar to an English reader in this connection, with one striking exception — false accusation. The last-mentioned offence (*q. v.*) forms in many respects a most important consideration, and if the Chinese mode of treatment be somewhat singular and rather involved, it is at least remarkably comprehensive. Contempt of Court and resisting arrest are other offences in this connection exhibiting the constant desire to draw distinctions.

SECTION II — CONTEMPT OF COURT

CONTEMPT OF COURT

This is of two distinct varieties, including both the contemning or disregard of the orders of a judge, styled *wei chih* 違制, and the insulting a judge's person, styled *chia chih* 挾制 — *v. fin* however.

The former offence is comparatively trivial, and is ordinarily punished with one hundred blows; the latter offence is more heinous, and is ordinarily visited with military servitude.

Such is the legal definition and explanation thereof. It is however more correct to consider the definition of 違制 as a general disregard of authority, and many miscellaneous offences are included under this head: — *e. g.*, to pawn a commission (H. A. H. L. Supp. vol. IV. p. 13): to trespass on the salt pans contrary to regulations and in defiance of Imperial Proclamation — the defiance entailing an addition to the ordinary punishment (H. A. H. L. Supp. vol. IV. p. 3): to buy or sell paddy in Peking to anyone but

those living there (H. A. H. L. Supp. vol. IV. p. 17): to go to sea from any but a regular port (H. A. H. L. Supp. vol. IV. p. 72): to buy contraband (H. A. H. L. Supp. vol. IV. p. 55): to shut the city gates (H. A. H. L. Supp. vol. IV. p. 45): to draw a petition of appeal to the Throne (H. A. H. L. Supp. vol. IV. p. 43): to sell tracts (H. A. H. L. Supp. vol. IV. p. 38): to fail to destroy gambling apparatus, dice, cards, etc., (H. A. H. L. Supp. vol. XIV. p. 37): to make suggestions to an examiner (H. A. H. L. Supp. vol. XIV. p. 38).

The other variety 挾制 applies not only to an insult paid to the person of a *judge* in his legal capacity, but also to insults paid to the person of those who are employed by or in Courts of Justice and during the discharge of their legal duties — in short insults paid to anyone in whom the majesty of the Law may be supposed in some measure to reside. The offences under this head are marked by a far greater similarity than is the case with that just noticed, the general element of violence or disturbance being present. So it is an offence

under this topic to go in a body to a magistrate's office, and noisily protest against any alteration being made in the Revenue regulations, after direction for revision has been made from the Capital (H. A. H. L. Supp. vol. IV. p. 3). And it is a more than ordinarily heinous offence to go in a body to any public office of justice, and create a disturbance therein, and strike an official — the principal being immediately decapitated and the accessories sentenced to strangulation subject to revision. In another instance a number of official runners who howled and ran out of a justice room, because one of their number was flogged for not carrying out the judge's orders, were sent to military servitude, and their ringleader condemned to slavery in the New Settlements (H. A. H. L. Supp. vol. XII. p. 29). It was indeed even suggested that the ringleader should be hanged, as it was a bad case — the runners having been bribed to pass over some doings of certain salt smugglers, and getting up the row to frighten the magistrate.

Those who enjoy a high legal *status*, it may be added in this connection, will be treated

with comparative tenderness for insulting the person of the law: so a member of the Imperial Clan who got drunk and tore a sheriff's coat was not treated with the fullest rigour (H. A. H. L. Supp. vol. X. p. 67): and two similarly favoured mortals for pitching into an usher who refused to allow them within the bar were permitted to commute their sentences of military servitude and transportation for imprisonment (H. A. H. L. Supp. vol. XVI. p. 29).

It cannot be too clearly remembered that contempt of Court is in Chinese Law viewed very broadly: neither of the varieties merely apply to the law alone: either are equally applicable to disregard or to an insult petty or otherwise paid the bearer of an official position. So rascals who enter an official office and insult the officials or their officers 棍徒直入衙門挾制官吏, or three or more persons who band together and insult an official 聚衆辱官, are guilty of 挾制.

SECTION III — PERJURY — FALSE ACCUSATION,
LIBEL AND SLANDER

PERJURY

This offence is divided into two categories: (1) ordinary perjury in Court — which is usually dealt with by the application of a leather slipper to the perjurer's cheeks or by a prompt bambooning, but of which there are also other varieties more severely punished; (2) bringing a false accusation — an offence of some magnitude, and dealt with in the next division.

Ordinary perjury in Court is not in Chinese Law a statement *on oath* made before a Court of competent jurisdiction in regard of a matter relevant to the issue. Such false statements need not be on oath, for an oath is not required in a Chinese Court; and furthermore the question of relevancy to the issue is not so strictly limited as in English Law — and statements rather the outcome of a picturesque imagination, and affecting points not relevant to the issue in hand, are considered as perjury.

Ordinary perjury in Court is apparently regarded with considerable favour, or at least with some tenderness. To merely make a false statement in Court, if it be not adhered to, and no consequences result, is punishable with but one hundred blows (H. A. H. L. vol. XLVIII. p. 36). The phrase for this form is 申訴不實, which might be translated as 'stretching the imagination', 'drawing the long bow' etc. — but more orthodoxly as the mere 'giving false evidence'. The penalty in this case, where reasons for benevolent mitigation arise, is often allowed to be commuted for fine. So in the case of Wang Hsiao-shih 王學詩, convicted of 申訴不實, allowed to commute the bambooning for a fine, and to present himself at the Examinations, before he had even discharged his liability — on the ground that he got into trouble through others 所犯罪名究係被人連累.

Another class of instances arises in cases where a person desires to screen an offender. It is laid down that in such cases the perjurer shall receive two degrees less punishment than the offender on whose behalf he has perjured himself (H. A.

H. L. Supp. vol. XIII. p. 42). Thus in the case of Kao Chao 高照, a prison warder convicted of giving false testimony 誣證 with a view to screening an offender guilty of homicide involving capital punishment. The offence found was deliberate perjury 故證, and though this may be said to have been an extreme case, yet the ordinary above measure of punishment was adjudged the perjurer.

A mother may apparently with some impunity perjure herself for her offending son 律得容隱 (H. A. H. L. vol. II. p. 43): and it is considered commendable to give false evidence on behalf of a husband or parents or an elder brother.

To commit perjury on behalf of an offender for fee is considered a kind of petty treason.

To give false testimony to another's disadvantage is considered as identical with bringing a false charge (*q. v.*) against him 妄供卽與誣告無異 (H. A. H. L. Supp. vol. XVI. p. 30) — and not as ordinary perjury in Court.

There is a curious mixed case of perjury and forgery combined, which it seems not wholly irrelevant to notice in this place — not perhaps

so much as illustrating any particular point herein (though the case is indeed rather closely connected with the foregoing), but more as indicating the mode followed by a Chinese Court when in doubt. The particulars were that certain persons forged some deeds: the principal was sentenced to death for causing the victim of the affair to commit suicide: the accessories perjured themselves over and over again in upholding the genuine character of the documents, and were sentenced to eighty blows under the well-known statute allowing one hundred blows to be given anyone who does what he ought not to do (*v.* case of Jên Shêng-hsiao 任聖効 P. A. S. P. vol. XXVII. p. 44). The fact was the Court was in doubt as to what offence the accessories were really guilty of — whether as accessory to forgery simply, or to forgery aggravated by perjury; or whether the offence was perjury simply, or whether it was perjury aggravated by forgery.

FALSE ACCUSATION, LIBEL AND SLANDER

False accusation, as has been remarked in the previous article, is a division of the offence

of perjury — but being somewhat intricate and decidedly peculiar needs special treatment. Within the meaning of the term is included a tangible portion of that intangible part of Chinese law — the Law of Libel and Slander. Law of Libel and Slander in our sense there is not: the mere perpetration of a libel or of slander is not punishable criminally, but will become so punishable if leading to some criminal act such as suicide. From this view the law on the point is part of the general law of responsibility, and is considered in connection with the resulting offence — this portion of the law is intangible, and melts away into the substantive offence. Thus to post up libellous placards regarding people **匿名揭帖** is not *per se* criminally punishable, but if moving the parties to strife, a criminal penalty may be inflicted (*cf.* our view of a criminal libel). The tangible portion of the law is included herein; for it is a criminal act to bring a false charge against a fellow-creature; and the series of rules on the point distinguish with infinite nicety between the degrees of gravity of the charge itself, the consequences direct or

indirect that have arisen out of it, the circumstances under which it was made, and (in a less particular manner) the character of the person charged, and the *animus* of the offender.

False Accusation. — The law on the point is as follows. ‘*Wu kao* 誣告, to charge falsely, ‘means to invent facts, and say that a person ‘has become liable to a penalty’ [to bring a false accusation of malice aforethought is phrased 挾讐誣告]: *fantso* 反坐, to transfer sentence, ‘is to sentence a false accuser to the penalty to ‘which he falsely states the person accused has ‘become liable.’

‘The increased penalty awarded false accusers ‘varies with the gravity of the accusation.’

‘Whoever charges another falsely with a petty ‘offence (*i. e.* an offence punishable with the ‘light bamboo only) shall be sentenced to the ‘penalty attaching thereto increased by two ‘degrees.’

‘Whoever charges another with a transportable ‘offence or an offence punishable with the heavy ‘bamboo or hard labour shall incur a penalty ‘three degrees heavier than that applying to the

‘offence charged, whether sentence has been
‘carried out or not, and so long that the penalty
‘does not exceed one hundred blows and
‘transportation to a distance of three thousand
‘*li* for three years.’

‘If the false accusation involves the more
‘severe degrees of transportation (*i. e.* for life
‘and
‘or with servitude on the frontiers or at the
‘mines), or the commission of an abominable
‘crime, the false accuser shall suffer death.’ [As
— *e. g.* — of larceny, to falsely accuse an honest
person of robbery 誣良爲盜].

‘If the false accusation has involved sentence
‘of death, but the sentence has not been executed,
‘the false accuser shall be sentenced to one
‘hundred blows and transportation for life to a
‘distance of 3000 *li* and penal servitude for
‘three years at the place of exile: and if the
‘capital sentence has been executed, the false
‘accuser shall be strangled or decapitated as
‘the case may be, and half his property shall
‘go to the family of the deceased.’

‘If the person falsely accused with an offence

‘involving hard labour has been already sent
‘thereto, or where transportation being involved
‘he has been already sent to his place of
‘punishment, though the conviction be subsequently
‘quashed and the person falsely accused has
‘been set free, the false accuser shall be compelled
‘to refund all expenses to which the accused
‘has been put from the time he was brought
‘before the Court to the day of his return home;
‘and if the accused has mortgaged or sold his
‘property, this will be considered part of his
‘expenses, and recovered in like manner.’

‘Should one of the family of the falsely
‘accused die in consequence of the accusation,
‘the false accuser shall be sentenced to death
‘by strangulation — and besides compensation
‘for the expenses incurred, half of his property
‘shall go to the person falsely accused as
‘provision for the family of the deceased.’

‘Where from poverty a false accuser is
‘unable to make compensation, he does not
‘thereby become liable to any aggravation of
‘the original penalty he has incurred.’

‘If the falsely accused in his turn brings false

‘charges against his accuser, he will be held accountable for them, and the original offender merely sentenced to the simple penalty for the charge brought.’

‘Where the person falsely accused tries to get his accuser into trouble, by falsely declaring the death of one of his (the accused’s) family to have occurred when accompanying him to his place of banishment, or represents as a relative a person not belonging to his family but who has died while in his company — the falsely accused shall in that case become liable capitally, and the accuser shall merely suffer for the original charge without aggravation and without paying pecuniary compensation. Supposing the false accuser in such case to have been sentenced capitally, and the sentence to have been executed, the falsely accused shall be capitally convicted; and where the sentence has not been executed, the falsely accused shall be sentenced to one hundred blows and transportation for life 3000 *li* distance. On the other hand, the penalty to which the false accuser had been sentenced shall be remitted, nor will he be

‘called upon to make compensation for the
‘expenses incurred in consequence of the false
‘accusation — for the reason that the false
‘accusation brought against him is more serious
‘than that of which he had been guilty.’

‘The above all refers to ordinary cases where
‘the accusation is *utterly* untrue.’

‘Where two or more accusations are brought,
‘the more serious of which are established,
‘while the less grave charges are disproved; or
‘where the several charges brought all involve
‘the same punishment, and one be found true
‘and the others false, no penalty attaches to
‘the accuser. For as it is laid down in the
‘general law, that if two counts be proved the
‘prisoner shall be sentenced under the more
‘serious and no notice shall be taken of the less
‘serious, or if various counts proved be of the
‘same gravity, the prisoner shall be sentenced
‘upon one count only; so in these cases of
‘several charges, some false and some true —
‘the falsity of some is not to affect the penalty
‘due the others, and there is no excess of
‘punishment to be transferred to the accuser.’

‘Where two or more charges are brought, the lesser of which are true, but the graver false, or where a charge is not true to its full extent (a charge being exaggerated), though in neither case is the accusation altogether false, still as the person accused becomes liable to a heavier penalty than he has justly incurred, the false accuser becomes liable to the difference between the penalty due and that adjudged. If the sentence of the accused has been carried out, the accuser will not be allowed to redeem the penalty to which he has become liable by payment of a fine, whether the penalty be simple chastisement or convict labour or transportation. If however the sentence has not been carried out, and the punishment be corporal, the accuser may redeem his liability by fine; and in like manner if the sentence be convict labour or transportation, the accuser may redeem his liability in accordance with the scale of equivalents; provided the penalty incurred does not exceed the equivalent of one hundred blows of the heavy bamboo — otherwise the one hundred blows shall be actually inflicted,

and redemption allowed only in regard of the 'further portion of the sentence.'

[So where the charge involved a penalty of one hundred blows heavy bamboo and three years' penal servitude to 3000 *li* distance, and it appeared the accused was only justly liable to one hundred blows heavy bamboo — the transportation being taken as equal to four years' penal servitude commutable in sum to two hundred and forty blows heavy bamboo — the accuser would be liable to one hundred and forty blows heavy bamboo, the excess penalty of which — one hundred blows — would be inflicted and the remainder redeemed by fine. Or again where the aggravation of the charge involved a penalty of one hundred blows and three years' penal servitude in place of eighty blows, the excess penalty to which the accuser is liable is twenty blows heavy bamboo and three years' penal servitude; and as in the five degrees of penal servitude the hundred blows heavy bamboo are commutable for forty, the full penalty to which the accuser is liable is one hundred and twenty blows heavy bamboo — of which one hundred

are to be inflicted, and the balance of twenty redeemed by a fine].

‘The reason for this discrimination is that the ‘greater portion of a charge must be true ‘where corporal punishment only follows, and ‘the greater portion false, where the difference ‘between the penalty incurred and the penalty ‘justly due amounts to more than the equivalent ‘of one hundred blows.’

‘If the charge proved involve the punishment, ‘no penalty will attach to the accuser for ‘exaggeration — though considerable. So if a ‘person accuse another of illegally exacting two ‘hundred taels, whereas the latter has only ‘exacted one hundred and thirty, no penalty ‘attaches to the accuser; as in all cases where ‘an amount over one hundred and twenty taels ‘is illegally exacted the penalty is the same — ‘strangulation.’

‘Where several *persons* are accused, the ‘penalty for false accusation will still lie if one ‘of them be shewn to be accused falsely — though ‘the offence charged be comparatively small. ‘So if three persons are accused, two rightly of

‘grave offences punishable with penal servitude, the third wrongly of a petty offence, the accuser will be liable to two degrees heavier punishment than the innocent person would have incurred if proved guilty.’ [And the gravity of the offence herein varies according to the number of those falsely accused — as where they be ten or more 誣十人以上].

‘If a prisoner himself protest that a sentence, whether of bambooning or penal servitude, which he has undergone and which has justly been accorded him is unmerited, or that the magistrate and his assistants have been careless in their conduct of the case, he shall incur the penalty attaching to the charge of the proved case *plus* three degrees — so long that the penalty does not exceed one hundred blows and transportation for life to a distance of 3000 *li*. If the relations of the prisoner similarly protest, they shall be sentenced to the penalty adjudged the prisoner less three degrees — so long that the penalty does not exceed 100 blows heavy bamboo.’

‘Where judicial officers, in their reports of cases tried by them, charge the persons

‘reported on falsely, or where officers attached to the Censorate bring charges from private motives, and the charges prove false, the full penalty adjudged an ordinary false accuser shall attach in grave cases, and the penalty for dishonest action on the part of high officials — *i. e.* one hundred blows and transportation for three years — shall attach in minor cases.’ [By ‘minor case’ is herein meant a case which does not involve one hundred blows and three years’ transportation].

‘Where the wild statements are made during a prisoner’s term of penal servitude, the case is to be dealt with under the law relating to offences committed by convicts.’

A point to be noticed is that notwithstanding the severe laws against false or coloured accusations, it seems to be a rule for persons to bring totally different charges to those to which they are entitled — and as the phrase runs ‘to put simple people in peril’ thereby 誣陷平人. So if complaining of abuse, a person will bring

a charge of aggravated assault: if complaining of common battery, a charge of attempted rape will be substituted. Judging indeed from the recorded cases, it is only by the current system of cross-examination that truth can be elicited — for there are always witnesses to testify in support of the charges, whether they be true in part, or altogether false.

SECTION IV — BARRATRY ETC. — ESCAPE — RESCUE —
RESISTING ARREST

BARRATRY ETC.

To incite or promote litigation 教唆詞訟 is discouraged.

To draw up an information for another, and make an intentional deviation from the truth therein, involves the same punishment for the assistant as for the false accuser — save in capital cases, when the punishment for the assistant is reducible a degree.

Blackguards who make a practice of bringing suits 積慣訟棍 are commonly flogged.

[On the subject of Barratry and Maintenance *v.* the interesting case of Lü Wên-ming 閻文明 H. A. H. L. Supp. vol. IV. p. 54].

ESCAPING FROM PLACE OF PUNISHMENT

An offender who escapes from his prison cell will incur a penalty two degrees more severe than that attaching to his original offence. If such an offender further release his fellow prisoners, he will incur the penalty of the most guilty thereof. If prisoners rise collectively against their jailers and forcibly escape, they will all thereby become liable to capital punishment — exception being made in favour of those prisoners who were merely coerced into so rising.

In regard of transportation, a prisoner who escapes from his place of punishment is, when caught, to be flogged, cangued, and sent back to the place he escaped from (H. A. H. L. vol. XIV. p. 87). The amount of flogging herein varies with the number of days absence — *e. g.* fifty blows for the first day's absence, and one

degree additional penalty for every additional three days' absence, so far that the total penalty does not exceed one hundred blows. A prisoner guilty of a capital offence, who has been excused the extreme penalty, because he had given himself up, or because he had given his principal up to justice, or because there were mitigating circumstances in the case, is to be executed if he escapes from his place of punishment (*id.*).

A prisoner who has escaped, will not, when caught, be allowed to count the time that he has already served, and his term will commence anew from the date of his return to punishment 仍發原配從新拘役 (H. A. H. L. vol. III. p. 52): and if he escape while undergoing a four years' term, his time may be increased to five years (H. A. H. L. vol. III. p. 53).

RESCUE

This is a grave offence punishable, under some circumstances, capitally (*v.* H. A. H. L. Supp. vol. V. p. 57) — indeed, under the old law, the penalty was decapitation for all concerned.

In the first place, distinction must be drawn

between an offender already committed to custody by the Court 罪囚 — to rescue such a prisoner being phrased 劫囚 — and a mere prisoner charged with an offence, but who has not yet appeared before a magistrate 罪人.

In the next place, distinction is drawn according to the number of those engaged in the rescue or attempted rescue. And first of a rescue by an individual or by a band less than ten in number. To join in the rescue of a prisoner upon the high road is punishable by one hundred blows and transportation 3000 *li* distance: and if, in the course of the rescue, the police are injured, the sentence will be strangulation subject to revision. If the band be more than ten in number, the principal will be liable to decapitation subject to revision, and the accomplices to the next degree of punishment set forth in the statute. Further by an edict of the 7th year of Yung Chêng, if anyone is killed in these cases, the principal — as organiser of the rescue — is liable to immediate decapitation, the striker of the fatal blow to immediate strangulation, and the other parties to lesser penalties. The edict

points out that distinction must be made between an organised and a chance rescue.

Additional questions arise by reason of the position of the rescuer. So in relationship, where more than one of a family are engaged in the rescue, the responsibility lies with the senior: but not if the junior planned the affair, and the relative — say an elder brother — interfered at the request of his junior. So again of master and servant. For a servant to simply follow his master by the latter's orders is excusable; but if the servant tries to hurt anyone, or takes any active part in the rescue, he cannot plead his lord's commands.

RESISTING ARREST 拒捕

The subject has in a measure already been dealt with incidentally, but a few points need attention in this place.

Distinction is drawn between resisting a peace officer and an ordinary person, and other distinctions are drawn in regard of the latter (*infra*). This first distinction is often dependent upon a second — had the person who resisted

actually committed an offence? and if he had — what was the nature thereof?

In regard of the first distinction, it is to be noted that ordinary persons are divisible into three categories: — *i. e.* those directly concerned or interested in the arrest, relatives of the person interested in the arrest, mere neighbours or strangers. It by no means follows that it is more serious to resist a peace officer than to resist an ordinary person (*infra*).

In respect of the second distinction, a person who resists arrest, but is satisfactorily proved not to have committed the offence for which he was arrested, will generally be excused, but may be bamboozed — the number of strokes varying according to the position of the person he resisted. If injury be inflicted upon the arrester, the penalty may be increased to transportation; or if serious injury or death, to a capital sentence — the penalty likewise varying with the position of the person hurt. Indeed in the event of killing or wounding the case may apparently be treated as killing or wounding in affray. It must furthermore be

understood in regard of this second distinction, that the arrester must have and show good cause for his action before the law hereon applies.

A person who resists arrest and has committed an offence will be treated seriously according to the nature of the offence committed, the position of the person resisted, and the injury (if any) done. In ordinary cases, the penalty due the original offence committed is aggravated two degrees — in so far that such increase of penalty shall not apply to capital cases, nor make those cases capital which less the increase would not be so. Accessories incur one degree less punishment than the principal.

It is important to notice the influence of the consideration of the position of the person who is resisted, and illustrations taken from larceny may serve as practical examples both of this particular point, and incidentally of other of the considerations above mentioned. So in *ordinary robbery* — with the exception of cases where the robbers kill or wound in the course of trying to effect their robbery, when no difference

is made (*cf. infra*) — a distinction is drawn between cases in which the owner of the property is killed or wounded in pursuit of the robbers or during an attempt to recover the plunder, and cases where the person killed or wounded was a neighbour or a stranger. The owner of the property is specially protected by statute, while the offence in the other cases is treated as one of ordinary killing or wounding with penalty increased by two degrees. No distinction is made in cases of *robbery with violence* between the owner of the property and his neighbours or strangers, if anyone is *killed* — simply in view of the gravity of the case: but in cases of mere *hurt*, the owner of the property is an injured person, while the neighbours or strangers are simply persons having a right to interfere (if they like) — and they cannot therefore be considered in the same light (*v.* also p. 421).

It has been said that it may be more serious to resist an ordinary person than to resist a peace officer. This also not infrequently happens in larceny: so it is a graver matter for an offender to stab the person he has robbed

when the latter tries to seize him, than to put his knife into a policeman who tries to take him into custody: in the former case it is death — in the latter merely an aggravation of the original offence: for they quaintly say a policeman knows what to expect and goes prepared — whereas the man who has been robbed, in the hurry of the moment, goes unarmed to capture an armed ruffian. But here also if the policeman be *killed*, the capital penalty is extreme and distinctions no longer prevail.

CHAPTER XVI

RELIGION AND OFFENCES AGAINST RELIGION

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

There are three recognized persuasions in China, Confucianism, Buddhism, and Taoism — and to these may now be added Christianity and Mahommedanism. Further there is the State Ritual (*infra*). In view of certain misconceptions likely to arise in connection with this portion of the Law, it seems desirable to briefly sketch the position of the first three persuasions and the State Ritual *inter se*, together with the manner in which the State regards them, and further to indicate the way in which the State has viewed the introduction of other tenets, and

the mode of legal discipline adopted therefor.

Of the three recognised persuasions, Confucianism holds the paramount position. It is upon this philosophical Code that much of the prevailing system of legislation has been based — the effect of the lapse of centuries having merely been to add, if possible, to the cogency of certain of the tenets. The other two persuasions, Buddhism and Taoism, do not receive such mental favour — and are indeed tolerated only so far that they do not impinge upon the domain of Confucianism.

Neither of the three above-mentioned forms of religion can be said to be ‘by law established’ — though incidental references to all three appear both in the Code and the Supplementary Laws. There is a ritual, however, to which these words may (but in a measure only) be applied. This is the State Ritual — a ceremonial concerning officials only and especially the Head of the State. The procedure consists in the worship of heaven and earth, the sun and moon, and certain natural objects; officials alone take part in the various exercises, and

the ordinary people have no share whatever therein. Many provisions in regulation of the Ritual appear both in the Code and the Supplementary Laws — and penalties are, upon the whole, heavy. It should also be added that the law on the point is extremely closely construed, and further that no part of the system is so little subject to legislative alteration.

In addition to Confucianism, Buddhism, and Taoism, it has been the custom for a considerable period to extend toleration to other creeds also; and material alteration has, within the last thirty years, been made in the law to the necessary effect — the result in general of pressure from without.

The manner in which the Chinese Government has usually regarded religious creeds cannot be expressed more aptly than in the words of a well-known writer who states that ‘the Government ‘tolerates no denomination suspected of interfering ‘with its own influence.’ This is the key to the law upon the point, showing why the introduction of certain foreign tenets has been from time to time deemed heretical, and the reason for legal

discipline. It may indeed be said that the breach of any particular doctrine *per se* is not legally punishable — what is feared is the introduction of poisonous seed.

It may be pointed out that in regard of the propagation of Roman Catholicism and other tenets, the objections raised thereto at different times have not been trivial or without the Law, but, on the contrary, have been based on strictly legal principles and rules. Of cases where specific religious clauses or laws upon the face of them applied, and have been applied, there is no need to speak. But where no provision exactly applied, and yet it has been sought to enforce legal discipline — the case is not so clear. The *modus* has however been to bring (without straining the meaning) the offence under some other clause — as *e. g.*, sedition, ancestral worship, treason. So of Roman Catholicism; the ‘immuring of young girls in ‘nunneries’ is neither more nor less than the offence of kidnapping children; ‘paying no worship to the dead’ is a direct violation of the legal provisions touching ancestral worship; the ‘confusion

‘of class distinctions’ is a form of sedition; and lastly and particularly, the ‘subtraction of a large number of subjects from the allegiance due their Sovereign’ is a form of high treason. Edicts have also been published from time to time making the printing of religious books and the preaching of the Gospel capital offences. But this is not extra-legal rigour; it is a perfectly legal measure — in the common phrase, ‘to suit the exigencies of a particular case.’ Much ridicule has been at various times directed on the apparent trivialities urged as ‘reasons’ in Imperial decrees — upon such phrases, for instance, as ‘distribution of foreign books calculated to seduce men with lies’, etc. The reason is based upon legal objections however, and the mode of enactment is equally in accordance with the law. Where — to give an example — would be the ridicule, if Chinese priests in direct infraction of Acts of Parliament should wander through England and distribute tracts.

The law touching religious offences *per se* (excepting the numerous provisions concerning the Ritual) is, as the reader will have gathered,

relatively rather scanty — offences in connection with religious observances being often treated under some other clause. There are however certain laws of great importance touching heresy, irregular procedure (including ritual), sacrilege, offences by priests, and, in especial, the treatment of the dead — the law on this last * point flowing from convictions of the most universal and deep-seated nature.

SECTION II — HERESY — IRREGULAR PROCEDURE ETC. —
SACRILEGE

HERESY

The offence of heresy is regarded as grave, and may be punished capitally. The rules drawn up in its regard bore special relation to certain indigenous practices, and when fresh doctrines, as Christianity, were imported from abroad, a new and more rigorous treatment was adopted therefor and incorporated in the system — now however not strictly in operation.

As regards the more ancient law, a good example of a not uncommon offence is the worship of certain unorthodox idols. So in the case of Ho T'ien-lin 郝添林, an offender who carried in procession the image of the 無生老母 or Unborn Mother was sentenced to penal servitude on the frontiers. The image in question was said to be unorthodox 邪教神像, and to carry it in procession against the law (H. A. H. L. Supp. vol. IV. p. 29).

So again of alleged magicians, sectarians, and teachers of false doctrines (for all such offenders are dealt with under one head), the possession and concealment of their images of worship, the burning of incense thereto, and the assembling of their followers for the sake of instruction, entails in each case strangulation for the principal, and one hundred blows and permanent transportation to 3000 *li* distance for the accessories.

An official who commemorates or performs sacred rites to the honour of any unorthodox spirit etc. incurs a penalty of eighty blows.

Christianity. — It is somewhat strange that various writers have stated that there was never

any reference to Christianity in the Code, forgetful of the provisions for punishing those who became converts to that faith — provisions not expunged until after the Tientsin massacre in 1870 (*v. Introduction*). Offenders were investigated before a magistrate and then required to make a recantation in form. This recantation at first consisted in stepping over a wooden cross; but the Roman Catholic priests seem to have freely allowed their converts to do this, as the crosses used for the purpose had not been consecrated. In the 18th year of Tao Kuang an edict accordingly provided that a convert, if he expressed himself as willing to recant, might prove his sincerity by trampling on the Crucifix he had been in the habit of adoring (H. A. H. L. vol. XXXII). Previous to this edict, also, an offender who had recanted and again relapsed would not be capitally treated but allowed one more opportunity; though the relapse would of course be visited with punishment in severe form — as in a case where two members of the Blood Royal, for adoring the Crucifix and practising the Christian religion after having been once pardoned

for doing so and duly recanting, were sentenced to penal servitude in Ili and to lose the privileges of their order — (His Imperial Majesty directing the names to be removed from the register). By the edict mentioned no such second opportunity was to be given.

IRREGULAR PROCEDURE : OBSERVANCE OF RITUAL

Many and varied offences occur under this head, and but one or two examples are herein given. The gist of such an offence is not the infraction of any orthodox religious creed, but the commission of an act contrary to religious procedure likely to set a bad example to others. A man may practise certain devotions, but it is not desirable that he should have extreme license in this respect. A man may entertain perfectly orthodox convictions, may zealously entertain and desire to put them into practice; it is just of this latter point that he must beware — fanatics are dangerous to the State. There are thus in effect two chief categories of offences under this head; the one a stealthy and subtle source of danger, the other open but equally dangerous.

So of private practice of certain religious forms. Privately practising incantations will subject the offender to transportation for life at least, and possibly to a capital penalty. Thus in the case of Hsü Wei 徐偉, the offender tried an incantation for a case of small-pox, and finding that it did not answer, stopped short. For this the penalty of transportation for life was adjudged; had the offender persevered, he would, it appeared, have been sentenced to capital punishment (H. A. H. L. Supp. vol. IV. p. 30).

And again of irregular demonstration of convictions. Pilgrimages, under an edict of the 14th year of Tao Kuang, are discouraged, as tending to disorder — and the persons getting them up are to be arrested and severely punished (H. A. H. L. Supp. vol. IV. p. 27). So again where persons ornament idols, and accompanying them tumultuously with drums and gongs, perform oblations and other sacred rites to their honour — the principal herein incurring a penalty of one hundred blows.

The Salvation Army would come to grief in China. So in the case of Li Tso-lai 李坐來,

who finding the zeal of the faithful waxing weak, started a salvation army to go out among the people and proclaim the approaching day of the Lord. There was nothing unorthodox in the doctrines preached, but as the scheme gathered people together and was calculated to unsettle their minds, the offender was excused the capital penalty of spreading heresy, but sentenced to transportation for life 3000 *li* distance (H. A. H. L. Supp. vol. IV. p. 29).

Officials concerned therein incur certain liabilities in regard of the due observance of ritual. So as regards the Imperial sacrifices, the officials concerned therein must prepare themselves by abstinence, and take vows therefor, and previous thereto must make due announcement of the intended sacrifices. Failure to comply with the regulation as to notice entails a penalty of fifty blows: and if in consequence thereof the proceedings are irregular the punishment will be increased to one hundred blows. If an official violates his oath of abstinence he will forfeit one month's salary. If the animals, silks, grain etc., for the sacrifices are not according to the state or quality

prescribed by ritual, the official responsible therefor will incur one hundred blows.

The various provincial officials are furthermore responsible for the due erection of monuments to the local and standard deities, and for the due worship of such.

SACRILEGE

This is heavily punishable, usually without any regard to any extraneous considerations. So for instance in robbery from a temple, no particular attention is paid to the value of the plunder — *e. g.* to scoop out and carry off valuables from the interior of an idol, larceny of the brass headed nails from a temple door, etc., etc., are equally punishable by immediate decapitation.

The theft of the consecrated Imperial oblations, or of any of the sacred utensils, cloths etc., used during the Imperial sacrifices entails decapitation for all concerned. Where the oblations, utensils etc., had not been offered up or consecrated, or where the oblations, utensils etc., had ceased to be used for sacred purposes, theft thereof will entail one hundred blows and transportation for three

years. To discard or destroy utensils consecrated to the service of the Imperial rites also entails a similar penalty to the foregoing. To destroy or damage, whether intentionally or accidentally, altars or mounds consecrated to sacred rites entails transportation for life 2000 *li* distance. To destroy or damage, whether intentionally or accidentally, the gateway to such ground entails ninety blows and transportation for two years.

SECTION III — OFFENCES BY PRIESTS — OFFENCES
AGAINST THE DEAD

OFFENCES BY PRIESTS

Priests are directed to be treated with exceptional severity — bound as they are to lead a godly life. So in the case of Wu Ming 悟明, who, in the course of a fight over a quarrel regarding property he had, stabbed two of his fellow priests — and the wound of one gangrening, the consequences were eventually fatal. As the

death occurred within ten days of the expiry of the thirty days' limit, the offender was recommended to mercy; and the Board had indeed in ordinary course commuted his sentence to penal servitude for life; but a special decree not only disapproved of the commutation, but directed that at the Autumnal Revision the name of the offender should be entered on the list of the really guilty (P. A. S. P. vol. XIX. p. 25). So again in the case of Chieh An 界安, where a priest got drunk and beat to death his deacon aged eleven. For this the penalty of decapitation subject to the Autumn Revision was adjudged, but an official decree ordered immediate execution (P. A. S. P. vol. XIX. p. 47).

And of other offences with like severity (*v. also Relationship — Master and Pupil*).

OFFENCES AGAINST THE DEAD

Post-mortems. — These are not permissible; as in the case of Chang Lieh 張烈, sentenced to a year's penal servitude and sixty blows for holding a *post-mortem* on his deceased wife (H. A. H. L. Supp. vol. VII. p. 30).

Making away with corpses. — To deliberately throw a dead body into a river, or burn it, or throw it to the dogs, to deprive it of burial, is transportation for life — the penalty being reduced somewhat if the body is recovered. It would seem, however, that there must be an intention to deprive the corpse of proper burial, or aggravating circumstances, for the law to be carried out. Nor is the owner of a field or court-yard justified in removing a corpse which he finds therein, before he has informed the Authorities, under penalty of eighty blows; or if the body is lost thereby, of one hundred blows — the penalty being increased to sixty blows and one year's transportation, if through the act of the owner of the field or court-yard the body is by some body else thrown into a river (H. A. H. L. vol. XXI. p. 1). And if the owner of the field or court-yard throws the body into a river himself, he will be liable to transportation for life — although his object was only to avoid getting into trouble (as in the cases of Ho Ching-shêng 霍敬盛 and K'ou Wên-yu 寇文友 H. A. H. L. vol. XXI. pp. 1—2).

Where a man is killed justifiably, and the slayer hides the body, the case will be treated as merely removing a body which the slayer has found on his premises — provided the hiding be not done in anger and with intent to deprive the corpse of burial. And an accomplice in an offence involving a capital sentence, who was convicted of burying a dead body to destroy evidence of the offender, was punished under a special statute by transportation for three years instead of for life (H. A. H. L. vol. XXI. p. 5) — but not so if the offence was capital (*id.*).

To make away with the corpse of a relation is an aggravated offence or otherwise according to the degree of relationship existing.

Desecration of coffins, graves, and cemeteries. —

The offences under this head are numerous in number, and are distinguished with much exactness of definition. Thus there is the digging in and breaking up another person's cemetery — with additional points as to rendering a coffin visible, opening a coffin, exposing the corpse etc. etc. Then there are the offences of breaking open an unburied coffin, destroying,

mutilating, or casting away, an unburied corpse. Furthermore relationship, as is natural, is a very potent consideration; and this whether the relation be natural or artificial — as, *e. g.*, master and servant. On some of the considerations in this rather gruesome subject in their order.

A coffin may not be opened after it has once been closed: so in the case of Yao Tê-mao 姚德茂, who was condemned for ordering his daughter-in-law's coffin to be opened to take out a silk mattress improperly placed therein: as a father-in-law, the offender was punished with a mitigated penalty, but the persons who acted under his orders were punished as accessories with the full rigour of the law (H. A. H. L. vol. XXI. p. 13). Again in the case of Lin K'o 林科, it was laid down that to open the coffin of a sister-in-law is a capital offence, whether she be the wife of an elder or a younger brother — for a sister-in-law is a connection, not a relation (*id.*); *secus* however in regard of a niece-in-law, where the benefit of relationship may in such case be claimed (H. A. H. L. vol. XXI. p. 17).

To constitute the offence of breaking open a coffin, it would appear that there must be actual breakage — forcing the lid open sufficiently to get a hand in is not breaking 僅止撬脫棺蓋鐵釘掀起一縫伸手摸取銀鐲並未揭開棺蓋顯露屍身自應照盜未殯未埋屍柩未開棺擲例 (H. A. H. L. vol. XX. p. 54): and to constitute what is termed seeing the corpse 見屍, the body must be exposed 係指屍身顯遭暴露者而言 (*id.*).

The desecration of graves and cemeteries is visited with great rigour. In the case of the Imperial tombs the penalty is lingering death; and in slightly less degree only as regards the tombs of worthies ancient or modern; and to break open a tomb even of the lowest and meanest and expose the corpse to view is a capital offence so far as the principal is concerned — though ordinarily commuted to five years' transportation. The points to be considered in these offences are, firstly the motives of the desecration, and secondly the relationship of the deceased to the desecrator. An ancestor's corpse to the time of the flood is sacred, and to

break an ancestor's bones by carelessness, is the same as to inflict the same injury upon them living. In this connection, to turn an ancestral cemetery into a wheatfield entails Siberia (H. A. H. L. vol. XXI. p. 34).

The penalty under exceptional conditions is light however — as where a coffin surreptitiously deposited in a family vault or in family ground is removed by the family in point, when but eighty blows will be awarded the principal: but Tsêng Kuang-liéh 曾光烈, for digging up a coffin buried ten feet from his lot was sentenced to military servitude — the coffin being placed in ground bought for the purpose (H. A. H. L. vol. XXI. p. 33): and Liu T'ing-ying 劉廷英 was held not to be justified in objecting to the burial and removing the coffin of Hsieh Tè-ch'êng 謝德成 and his wife — although the ground was public common (H. A. H. L. vol. XXI. p. 32).

It is no great excuse that an old barrow was opened merely in pursuit of archaeology — this latter study is not much thought of in China: if the student knew coffins were in

the old barrow, he would be sentenced to transportation for three years, and if he did not, to penal servitude for a short space (H. A. H. L. Supp. vol. VII. p. 33).

Desecrating ancestral tablets. — This applies chiefly to the tablets of ancestors of the desecrator, though to destroy or otherwise desecrate of malice aforethought the tablets of other person's ancestors is also heavily punishable. To destroy the ancestral tablet of his ancestor renders the desecrator liable to decapitation: and for accidentally smashing a tablet while he was in liquor, Ch'ü Yang Shih Ying 區陽世英 was sentenced to one hundred blows and transportation for life to a distance of 3000 *li*.

It should be noted that offences in this regard are among the most heinous known to the law.

Cremation 屍身燒燬 — This is contrary to law, though among the Miaotzu it would seem to be customary (H. A. H. L. Supp. vol. VII. p. 32). The principle herein acted on is that a good spirit needs no cooking, and that if the process be adopted, no spirit will be left.

CHAPTER XVII

COMMERCE AND OFFENCES AGAINST COMMERCE

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

The provisions of the Code relating to Mercantile Law are singularly few in number and narrow in range, and the published cases on the point are not very numerous. The explanation generally speaking is that, as occasion arises, provisions in regulation of trade are laid down and promulgated at the mart they more particularly concern. It has been considered judicious to pay special regard to special circumstances; and with that end in view the local Authorities are, generally speaking, given

ample powers. Naturally certain general principles apply, but in addition a certain special latitude has been allowed.

The Chinese have a different understanding of the words Free Trade to our own. A paternal Government has laid down the course to be pursued, trade is invariably taxed, and every transaction has to be carried on through licensed agents. The merchant pure and simple, or the person who ventures 客商, have both equally to buy their goods through the established factors, settle the freight for shipment of the goods through the licensed brokers, and sell the goods when they arrive at their destination through the regular dealers. On the other hand, while the trader fulfils these legal requirements, and pays his duties, he is protected from what the law considers unfair competition (*v. infra—Trade Combinations &c.*) — and the net gain to the Chinese trader is considerable.

Though the conduct of trade has been placed under strict discipline, it has not, however, been unnecessarily fettered — and accordingly Chinese traders, upon the whole, follow the prescribed

course of the law. At certain marts, at certain times, and with certain articles of commerce, malpractices are common enough: then bribery is attempted to hush the matter up: and when this latter has in turn been exposed, the usual portentous notifications appear — with, it must be admitted, some effect. On the whole, commerce in China is facilitated and secured to a very fair degree: but the prevalent standard of commercial responsibility and honesty is perhaps more efficacious than legal force.

The considerations dealt with in this connection probably more constantly vary than any other portion of the law, and frequent and close perusal of the numberless local regulations is absolutely necessary to obtain a true knowledge of the legal mercantile conditions prevailing at any given time and mart.

SECTION II — LICENSED BROKERS ETC. — TRADE
COMBINATIONS ETC. — OTHER INTERFERENCES
WITH TRADE — COMMERCIAL GAMBLING

LICENSED BROKERS — COMMISSION AGENTS —
SHIP-BROKERS

Licensed brokers 經紀, commission agents 牙行, and ship-brokers 般行埠頭, are established at the various marts, and various laws have been made to prevent them abusing their privileges. These brokers or agents are to be selected from among individuals of wealth and standing: they are required to keep certain official registers of the various vessels or merchants that may arrive, and also full records of all merchandise imported. The various records are subject to inspection every month at the local magistracy. Among the onerous duties attaching to the position of a licensed agent are those regarding the fair valuation of merchandise and assessment of fines to which an offender may have become liable. Any error in valuation, whether in excess or in diminution of the proper sum, entails upon the

agent a proportionate penalty for embezzlement : if the agent convert such difference to his own advantage, a proportionate penalty for theft attaches. Any error in assessment of fines or forfeitures entails on the agent the penalty attaching to an official who gives a wrong judicial decision. Brokers are not allowed to demand exorbitant commission and retain the proceeds of the property confided to them for sale until they are paid what they ask 牙行及無藉之徒誣賒貨物無從賠還 (v. case of Chang Ta-chi 張大吉 H. A. H. L. Supp. vol. IV. p. 15).

TRADE COMBINATIONS — CORNERS

Arrangements to artificially influence the market are contrary to law. For a person to unduly depress or raise prices to suit his own convenience entails a penalty of eighty blows ; and undue profit arising therefrom will be treated as theft.

Trade Combinations. — Our railway directors and shipping agents would be in gaol in a very short time, if they ventured on their ordinary practices in China, under the clause 光棍霸

開總行逼勒商人不許別投例 — *i. e.* the law against 'ruffians establishing conferences 'and preventing shippers chartering outside vessels'; and the originator of the combination to raise sales would be sent to military servitude on the borders after a month's cangue, while those who combined with them would get one hundred blows and three years' transportation. So in the case of Chang Hao 張浩 and others, where some licensed shipping agents and others who combined to raise the rates on a demand for transport arising were so sentenced (H. A. H. L. Supp. vol. IV. p. 15).

Corners. — Forbidden. So in the case of a corner in bread stuffs denounced by special edict from the Throne; and the Governor-General of the province wherein the case arose was directed to enquire into these practices and punish the offenders 查有奸商買空賣空情弊即行懲辦 (H. A. H. L. Supp. vol. IV. p. 21).

OTHER INTERFERENCES WITH THE COURSE OF TRADE

Strikes 糾衆抗差. — It is decapitation to agitate against the repair of the bunds or

embankments, if there be pressing necessity therefor, and so agitating keeps people from coming forward: and, as in the case of Li Chia-shên 李嘉申, if a person simply agitate against ordinary repairs, he will be transported for life (H. A. H. L. vol. LX. p. 62).

Strikes are not often risked.

Levyng Tolls. — This, if done unauthorisedly, is held an interference with trade (H. A. H. L. vol. X. p. 49).

COMMERCIAL GAMBLING

Generally and strictly forbidden. So gambling transactions in grain are severely dealt with, especially by an edict of the 12th and 15th years of Tao Kuang with reference to the establishment of corn exchanges, at which certain firms bought and sold for the account 買空賣空, paid differences 懸擬價值轉相招引, and fixed dates for settlement, etc. (H. A. H. L. Supp. vol. IV. pp. 21—22).

SECTION III — MINING LAWS — COPYRIGHT — WEIGHTS
AND MEASURES — MISCELLANEOUS

MINING LAWS

It is not permissible to prospect for gold without license, but the offence varies with the locality. In the New Territories the punishment is military servitude, in China Proper merely canguing and bambooning. Special edicts prohibiting gold washing 偷淘金砂 in certain districts, as at Ta T'ung Hsien 大通縣 in Shansi, usually fix a penalty something between the two (H. A. H. L. Supp. vol. VI. p. 29).

Distinction is drawn in regard of the penalty as to whether any gold has been obtained or not (*id.*).

Other mining is on much the same footing, but the penalty seems to vary according as the metal is less or more precious than gold.

COPYRIGHT

This exists chiefly in respect of official publications. So in the case of Li San 李三, sentenced to one hundred blows heavy bamboo

for printing an edition of the official calendar without license: the compositors, printers etc., who assisted the offender were sentenced to forty blows of the light bamboo.

WEIGHTS AND MEASURES

These must be conformable to standard and be issued under Government sanction. To make false weights and measures, to procure such, or to tamper with the duly issued standards, are equally punishable with sixty blows. Measures, no matter how correct, which have not been officially examined and sealed, may not be employed — under penalty of forty blows.

Officials connected with the duty of issuing standard weights and measures naturally incur special liabilities thereby: so if any measures not made according to the established rules are issued under the sanction of Government, the official who issued the measures, and the artificers thereof, are liable to a penalty of seventy blows.

MISCELLANEOUS

Illicitly quitting the country. — This is

regarded as an offence against trade, inasmuch as the chief object which ordinarily induces a person to leave his country is the desire to make money by trade. The offence is nominally most heavily punishable — decapitation both for the offender and the officials concerned. The offence is however in practice much less heavily punishable now than hitherto: so in a well-known case where a Cantonese convicted of shipping on board a foreign vessel was sentenced to one hundred blows and transportation for life 3000 *li* distance, under the clause against going beyond the Great Wall without a passport 無票私出口外例 — *cf.* our *ne exeat regno*.

SECTION IV — USURY AND DEBT

USURY AND DEBT

The rate of interest fixed on a loan of money or property of value is three per cent per month. For a money lender to demand more than this

very liberal rate is subject to a penalty of forty blows — but in no case to exceed one hundred blows. The law on the point is nevertheless frequently transgressed, and the rates of interest current vary much in different parts of the Empire.

The case of Chin Shêng-chang 金勝章 gives an insight into the procedure for the recovery of debt. The course appears to be to present a petition to the necessary effect to the magistrate, who thereon furnishes a bailiff with a warrant to collect the money. Armed with this warrant, the bailiff arrests the debtor, and keeps him in custody until the debt is paid — or if there be delay in the payment, and with a view to expediting it, takes the debtor from time to time to the magistrate to receive a certain amount of castigation (P. A. S. P. vol. XX. p. 21).

It is not permissible for a creditor to chain his debtor up on his own account, and if the debtor dies of starvation in consequence, the creditor will be liable to strangulation. In this connection, it is stated that if the creditor's agent was in fault, and the creditor himself had no

knowledge of what had been done, the latter will be sentenced under the clause of doing what he ought not to do; and if capital results follow the penalty will be proportionately increased. Presumably in the latter case the agent would be sentenced as an accessory.

It is not permissible for a creditor to seize a debtor's property in satisfaction of his claim; but it is a comparatively venial offence, and is punished with eighty blows. Even though the property belongs to the debtor's family, and the debtor has only an interest in it, the seizing creditor will not be dealt with as an ordinary robber — with its contingent disadvantages. So in the case of Chêng Ch'ien-ts'ai 鄭乾彩, where a creditor seized six cows owned jointly by his debtor and the debtor's brother, and killed the debtor in the course of the robbery, the Board insisted upon the homicide being considered as killing in the course of an ordinary affray, and not in the course of robbery — inasmuch as the debtor had an interest in the cattle, and the creditor clearly seized them more or less in consequence of being unable to recover his just

rights (P. A. S. P. App. vol. II. and *ante* — p. 387). The Provincial Authorities thinking that to distrain six cows for a debt of some fifteen dollars was beyond question a case of robbery, and much impressed by the fact that the cows belonged to another, had treated the case in the first instance as an aggravated instance of armed robbery with violence (*id.*). And so mere hurt arising during such an affair will merely be considered battery with intent, and not as ordinary robbery with violence (H. A. H. L. vol. XVI. p. 1).

But the advantageous treatment accorded a creditor is of a somewhat negative character; the simple fact remains that he must not take the law into his own hands, and that relying on the law may put him to serious expense and loss of time. A not uncommon solution of the difficulty, therefore, is for a creditor to hang himself outside his debtor's door, and get the latter strangled for it.

If a dealer fails to pay his constituents, he will be punished more severely than an ordinary debtor. Supposing the debt to be above Tls.

1,000, the penalty will be a year's imprisonment and periodical pressure; and at the end of the year, if the debt has not been paid, ninety blows of the heavy bamboo, commutable in exceptional cases to thirty-five blows of the light bamboo — the debt still to remain due. A case of the sort is that of Hsiao Kuang-ai 蕭洸霽, who had not registered his firm and obtained goods on credit. Of these goods, a portion was lost during transit over rapids, and the remainder was disposed of — a deficit of Tls. 11,600 resulting, of which Tls. 2,900 were recovered. No fraud it is said was imputed; but the debtor was sentenced to be imprisoned for a year unless he paid the money in the meantime, and at the end of the year to receive thirty-five blows of the light bamboo: the debt still to remain due (H. A. H. L. Supp. vol. IV. p. 23).

A gambling debt 賭欠 gives rise to no legal liability, and a person who is importunate 索討 therefor will suffer.

SECTION V — SMUGGLING

SMUGGLING

This is considered an injury to legitimate trade, and the smuggler must therefore be held to designedly injure the legitimate trader 私販有礙引鹽卽屬侵損於人 (H. A. H. L. vol. X. p. 30). What is meant by this is an offence deleterious in the primary degree, not to the State, but to the public at large. It is a prevalent practice extremely agreeable to the Chinese constitution, and holding forth considerable pecuniary advantages. The established law on the point is rather meagre, and distinction is made between smuggling in general, and the smuggling of tea, alum, salt, opium, etc.

In regard of smuggling in general. Whosoever endeavours to defraud the revenue by paying less than the rated duty will be liable to a flogging and forfeiture of one-half the value of the goods concerned. To convey goods through a barrier or customs station without a proper pass renders the offender liable to all the ordinary penalties for smuggling: and, quaintly enough,

it is an offence within the law on this point to purchase cattle without a stamped contract therefor. Other provisions lay down penalties for the production of false manifests — in the case of omissions, all goods so omitted being liable to confiscation.

In regard of the smuggling of salt, alum, and tea, there are special provisions. The salt trade is a monopoly carried on by a limited number of merchants under special Imperial license, and the supervision of the salt monopoly is the care of a special department of the administration. To engage in the trade without a license is liable to be visited with a flogging and transportation: and distinctions are herein drawn as to whether or not such smuggler was armed. The salt itself, and the vessel, cart, etc., in which it was conveyed, are forfeited to the State. Furthermore, the pilot or guide, the agent, the harbourer, and the consignee, are also liable to transportation and a flogging. To purchase salt knowing it to have been clandestinely transported or prepared renders the purchaser liable to one hundred blows.

The clandestine sale of tea, and manufacture and sale of alum, are subject to the provisions relating to salt smuggling.

It may be well to add that these few selected points have in no way any connection with the administration of the Customs under the Foreign Inspectorate.

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CHAPTER XVIII

MISCELLANEOUS OFFENCES AGAINST PUBLIC MORALITY AND HEALTH

SECTION I — GENERAL CONSIDERATION

GENERAL CONSIDERATION

Under this head are included certain offences of a miscellaneous character considered to be injurious to the public morality or health. It is not proposed to give a disquisition upon Chinese metaphysics, but it may be pointed out, that the government of the country being founded upon moral agency in preference to physical force, the view adopted in connection with these offences has been merely to indicate transgression by legal provision, without insisting upon too stringent a construction or administration of the

latter. Accordingly, and for instance, gaming has been legally indicated as a transgression, but in practice is much tolerated.

None of the offences under this topic offer any peculiarly intricate reasoning. Of the various considerations, those touching bigamy are perhaps the most important — it may indeed be news to many to know that there is in China such an offence at all. The law on the point is however rigid (*cf.* also *Husband and Wife* — *p.* 171). There is a curious assumption in this connection regarding the inference of a husband's death after absence for more than a given period, which closely resembles that well-known rule of our Law of Evidence — the presumption of death after seven years' absence.

Of the other offences — those touching gaming, the stage, and poisons are most noteworthy.

As regards the stage, the theatrical profession is at present in China in much the position that it held in Rome. An actor has not a perfect *existimatio*, and is as it were branded *levis nota*. Poisons are under judicious surveillance — in theory: but there is no Public Health Act —

nor officials under the Act, to carry it into effect. There is a curious provision on the point touching the rearing of venomous animals — be it noted, with a view to destroy human life; and accordingly Zoological Gardens would be permissible.

SECTION II — BIGAMY

BIGAMY

It is an offence, punishable with ninety blows, to take a second spouse, and the marriage is null and void. Whereas however, it frequently happens when a man is heir to two families that he takes two wives with a view to continuing the succession, in ignorance of the law, it is provided that in these cases the parties shall not be compelled to separate — but, as no man can have two real wives, the *status* of the one last married will be that of secondary wife (H. A. H. L. vol. XL. pp. 21—24).

It is by law a capital offence for a wife to

run away from her husband and marry again — if she do so deliberately. If however the wife had been beguiled away, and marries because she is afraid to go back, or is married off by her seducer, she is merely liable to transportation (*v.* case of Mrs Chu née Li 祝李氏 H. A. H. L. vol. XX. p. 26). The liability of the wife will arise even though the first marriage was illegal (H. A. H. L. vol. XL. p. 3).

If the husband has been away for three years and upwards, and during that period nothing has been heard of him, it may be assumed that he is dead, and the wife may marry again on petitioning the Authorities: and it appears that the wife may marry again if she has not heard from or of her husband for the above space, although she knew that his absence was primarily caused by the fact that he had been transported — as in the case of Yün Ta-hsiao 雲大小, where a period of five years had elapsed (H. A. H. L. vol. XL. p. 1). On the latter point the law is not clear (*cf.* *Husband and wife* p. 190). The wife will also be only liable in a measure if — her husband being away

and alive — she marries again *within* the space of three years — provided she did so in the honest belief on reasonable grounds that he was dead (*cf.* *R. v. Tolson*).

SECTION III — GAMING AND GAMING HOUSES — PLEASURE
HOUSES — PROFLIGACY IN OFFICIALS — THEATRICAL
OFFENCES — PROPAGATING IMMORAL LITERATURE
— WITCHCRAFT — POISONS

GAMING AND GAMING HOUSES

This is strictly forbidden, though in practice prevalent and seemingly condoned. By gaming 賭博 is to be understood playing at any game of chance for money or for goods, and a penalty of eighty blows attaches for so doing, while the stakes are to be confiscated to the State. Even a friendly game for a bottle of wine is punishable with eighty blows (H. A. H. L. Supp. vol. XIV. p. 37), while the dice are to be destroyed and the stakes confiscated.

To keep a gaming house renders the proprietor thereof liable to the penalty for gaming, while the house becomes forfeit to the State.

PLEASURE HOUSES

To keep such, if tending to the abasement of the general morality, is forbidden under heavy penalties. To keep a music hall and an opium divan attached thereto is in any event punishable with one hundred blows and three years' transportation — and no *circonstances atténuantes* are allowed (H. A. H. L. Supp. vol. XIV. p. 30).

And so in strictness with brothels — the brothel keeper 娼戸 incurring liability therefor.

PROFLIGACY IN OFFICIALS

Such tends to set a bad example to the people — the more so being on the part of those whose duty it is to set a high moral standard. So an official who merely spent a night at a music hall was punished with sixty blows and the loss of his office (H. A. H. L. Supp. vol. XIV. p. 30). The same penalty attaches to the sons of those who possess hereditary rank. An official who games or keeps a gaming house (*supra*) incurs a penalty one degree heavier than an ordinary person.

THEATRICAL OFFENCES

Acting is by no means discouraged by Chinese Law — the representation of worthy characters exercising a beneficial effect on the audience. Certain limits however have been fixed by the law with regard to representation, it not being allowable to represent on the stage such parts as former Emperors, Empresses, famous princes, or ministers, under penalty of one hundred blows. This law, however, seems chiefly to be honoured in the breach.

Though acting is not discouraged, it is by no means considered a very honourable profession. So actors who purchase the sons or daughters of free persons with a view to educate them in the profession incur thereby one hundred blows, as does also the person who knowingly so sells — a middle-man in the transaction incurring one degree less punishment. An actor is also under personal disabilities as to the marriage or adoption of free persons.

PROPAGATING IMMORAL LITERATURE

*The author or compiler of an immoral publication incurs thereby one hundred blows and transportation for life to a distance of 3000 *li*. If an official so offends, degradation and deprivation of office will be the penalty. The vendors of such immoral publication incur a penalty of one hundred blows and transportation for three years; and the purchasers and readers incur one hundred blows.

The magistrates and officials generally are naturally responsible for the production and dissemination of immoral literature, and are liable to prosecution by accusation before the Supreme Authorities for want of vigilance in this duty.

WITCHCRAFT

This is nominally punishable with decapitation subject to revision; to write books on the subject is also nominally so punishable. The penalty is however gauged by reference to the effect of the offence. Were few persons, or many, influenced? And if but few persons were

influenced, the penalty adjudged will merely be transportation.

Witchcraft forms an important element of aggravation in certain cases: so to murder a person with a view to maul or mangle his body for magical purposes entails slicing to pieces (*v. Murder*).

POISONS

Theoretically under strict legal supervision. To sell poison without first having made due enquiry as to the reason for purchase is punishable with eighty blows (H. A. H. L. Supp. vol. VIII. p. 68). Still it is to be seen in nearly every stall in Northern China, and the salesmen betray no undue inquisitiveness in selling it.

To purchase a poisonous drug for the purpose of killing any person is punishable with transportation for three years and one hundred blows. To sell such a drug knowing the purpose for which it is bought entails the same penalty.

To cultivate and prepare dangerous shrubs, or to rear venomous animals — *e.g.* snakes — for the purpose of destroying human life entails decapitation.

To leave poison about where people are in the habit of going entails transportation for life (H. A. H. L. Supp. vol. VIII. p. 67).

To use poison for purposes of adulteration, however good the reason, is punishable, and if lives be lost in consequence, heavily — so that if it be put into wine to give it body, and persons are killed thereby, a dealer will get military servitude for life (H. A. H. L. Supp. vol. VIII. p. 69).

EXCURSUS

NOTES AND DECISIONS, ETC.
ON THE
LAW OF PROPERTY, INHERITANCE,
TRUSTS, ETC.

SECTION I — LAND TENURE — RIGHTS OF WATER — ACCESSION

DO II — DISPOSITION OF PROPERTY *MORTIS CAUSA*

DO III — TRUSTS

DO IV — GUARDIANSHIP OF INFANTS

EXCURSUS

Section I — Land tenure — rights of water — accession

The original right of property in land is that of the State — not of the Emperor personally, but of the Emperor, under law, as the representative of the State. In some places also land is held by direct grant from the Emperor to military servants — this practice dating from a period some two or three hundred years back, when the Tartar rulers, in disbanding their armies, provided for their old soldiers by giving them grants of unoccupied land. The general, nearly universal, legal tenure is however acquired by cultivation — by what we should call ‘squatter’s right’. Any man may enter upon unoccupied land and cultivate it; and

when he has brought it under cultivation, by going to the District Magistrate, and professing himself willing to pay the annual State ground tax, he can be registered as legal owner — taking out as it is called a *hung ch'i* 紅契 or red title-deed, which forms the root of title. He has reclaimed the land, and thereby acquired a right to it, subject to subscription to the general necessities of government; and so long as he keeps the land under cultivation, and pays his ground tax, it is his. The land may even be allowed to lie fallow.

This right in land confers upon the owner no special eminence. It is no claim to distinction in China to be the owner of 100,000 acres of waste moors. Consequently, what the owner cannot cultivate himself, he lets to others — but without the oppressive restrictions which hold in this country. Merely the current value is taken as a deposit, with the right to resume ownership by the return of the sum given. The taxes, the landlord, as registered owner, has to pay, and as they generally far exceed in value the improvements that the tenant has to make, the latter has no ground for quarrel. The tenant is quite free to sell his

interest in the land by simple deed, on every transfer a tax being of course paid to the Government for authorisation.

The landlord may sell his estate absolutely, and the purchaser by payment of certain fees — not too oppressive — then gets a direct title, and becomes liable for the State tax. Sale with conditions is unknown. The Chinese do not understand legal rights giving ridiculous privileges : a butcher has a right to ask a person to pay for sausages sold, but not to say whether the buyer must fry them or eat them raw : so a landlord in China, if he sells, must sell, and not dictate what the purchaser must do with his property.

On such sales of land there are occasionally prepared documents in some sort corresponding to our abstracts of title. But usually merely a simple undertaking (by deed) for responsibility as to ownership and taxes is entered into by the vendor and purchaser. Alienations without such deeds are viewed with suspicion on subsequent sale, and where they are forthcoming it behoves a subsequent purchaser to carefully examine both them and the original *hung ch'i*.

It may be added in conclusion that entail, in the strict sense, does not exist; but where property is devised coupled with a condition such as the maintenance of ancestral worship it is criminal to alienate it.

Rights of water. — If a man steal the water from a reservoir constructed by the owner of the land to water his field, the owner may seize him as a trespasser, and the fact that he was so will be considered in adjudicating on any injury the owner may do the trespasser. Nay if the trespasser be armed, and in fencing with him, the owner kills him, he will be held harmless (H. A. H. L. vol. XXX. p. 27 — also *v. Justifiable homicide of trespasser*).

Rights by acccession. — Reclaimed washes come under the same category as reservoirs constructed for irrigation purposes; but to acquire property in them, report must be made to the Magistrate of the intention to reclaim, the ground must be measured, and the tax thereon fixed. Should banks form, the owner of the adjoining land can get them added to his property; but he must first have an exact measurement made,

and report as before — otherwise persons carrying off crops therefrom cannot be treated as trespassers.

Section II — Disposition of property mortis causa

There seems to be no absolutely fixed law in regard either of inheritance, or testamentary dispositions of property; but certain general principles are recognised, which the Court will not allow to be disregarded without sufficient cause.

CASE I — DECISION OF LI HSIN-SHUI

*Paternal property equally divisible between sons
whether by 1st or 2nd wife, subject to claim
of 1st wife for burial expenses, etc.*

In this case, Ho Shêng-chi and the deceased Ho Shêng-chung were by the 1st venter, and Ho Shêng-mao and Ho Shêng-hui by the 2nd venter, and their father seems to have left an

estate of 47 *mu* of land to the four in common.

The principal wife Mrs Lo does not appear to have had equal affection for all the children, but to have grasped the whole for Shêng-chi, not only holding the property, but eventually selling it secretly for Tls. 150 — the sale being in the name of Mrs Lo, but really for the benefit of Shêng-chi.

Now however comes a bad business on the part of Shêng-mao, who, though at first opposing his half-brother, seems to have been won over by the bribes and cajolery of Mrs Lo and her son to their side, and to forgetfulness of his full brother Shêng-hui — who is left single-handed in the lurch.

When the case came on, Shêng-chi had not a word to say for himself; but Shêng-mao, thrusting himself forward, flourished about, saying Mrs Lo was the head of the family and Shêng-chi was his elder brother, that he was quite willing that Tls. 50 should be set aside for Mrs Lo's funeral expenses, and that the remaining Tls. 100 were still in Shêng-chi's possession, and had not been made away with.

We wondered at this, not seeing from where Shêng-mao had got his surprising knowledge of propriety, and unable to reconcile his present self-abnegation with his previous attack on his elder brother, when, hearing an exclamation of disgust, our attention was drawn to Shêng-hui who was standing there — and questioning him, the whole story came out as clear as the palm of your hand, and Shêng-mao's scheme fell to pieces.

The fair decision therefore seems to be that Tls. 50 should be set aside for M^{rs} Lo's funeral expenses — for though the sum be more than sufficient, it is a duty of children to provide for the burial of their mother, and the principal wife is entitled to privileges over the secondary wives ; and further that the remaining Tls. 100 be divided into four shares, and Tls. 25 each given to Shêng-chi, Shêng-mao, Shêng-hui, and Ho Wên-shui son of the deceased Shêng-chung. All agree to this, and the case is at an end ; but as quarrelling among brothers is not commendable, Shêng-chi and Shêng-mao must be chastised according to their deserts. Shêng-chi is to pay the various shares.

per Li Hsin-shui M.

Note. — The principle laid down is that at the death of a father his property is considered to be vested in all his sons equally, whether by the venter of his principal or secondary wife; and although the principal wife if surviving has a certain right of administration, and a claim on the estate for provision for her funeral, the property does not vest in her, and may on cause shewn be distributed among the heirs; also that on the decease of one of the joint heirs, his interest vests in his heir or heirs. Further it appears that a secondary wife has no claim on an estate.

CASE 2 — DECISION OF LI HSIN-SHUI

Sons, whether by first or second venter, must share and share alike. A junior should for form yield his senior a larger share, but the senior should not accept it.

This is a dispute between Yao Wu-chü and Yao Wu-wei, arising out of a mistake on the part of their deceased father Yao Ta-hua.

Wu-chü appears to have been the son of

Ta-hua's first wife, and Wu-wei only of his second. But although Wu-wei was young then, he would grow up afterwards, and Ta-hua having the reputation of knowing what was due to his children, should not have exalted the child of his first wife and abased the child of his second, by leaving the first 6/10^{ths} and the latter 4/10^{ths} only of his property.

And Wu-chü on giving the matter full consideration should have set the will aside and paid no attention to it, coming to a fair arrangement with his brother; for the maxim "the will of the father should be respected" was uttered with regard to the succession to a kingdom, and cannot be quoted by Wu-chü in the matter of family succession.

Nor does the maxim "the younger brother should take the less share of the fruit" apply — for it is not said that the elder brother should take the greater.

I do not think however my predecessor was right in ordering Wu-chü to pay his brother Tls. 2,000, as this was impoverishing the elder to enrich the younger, and his imprisonment and

harsh treatment must have troubled Wu-wei. However, the misfortune is irremediable; in fighting for the fleece they have wounded the body. The decision of the Magistrate that Wu-wei should disgorge Tls. 500, and each rest satisfied, appears fair to both.

We decree therefore that the Magistrate's decision be upheld, and the dispute be so settled; and we recommend both parties to remember that further litigation will only lead to the utter waste of the family property, and their reduction from wealth to poverty.

per Li Hsin-shui M.

CASE 3 — DECISION OF CHANG MEI-AN, MAGISTRATE
OF CHUN-AN IN CHEKIANG

*Sons, whether by birth or adoption, preferred to
daughters, and their claim to inheritance
upheld even against written will.*

In this case Yeh Pi-chien's principal wife, Mrs Li, a blind woman, having no sons, but a daughter only, married to Yu Chi-wên, Yeh tried to get

over the curse of her barrenness by taking a second wife Mrs Hsü — and in his extreme anxiety to make provision for the due performance of the ancestral rights, adopted Yi the second son of his younger brother's wife Mrs Wang.

No sooner was this complete, than the second wife conceived and Yeh Pi-chien died, leaving a posthumous son and a destitute mother; for Mrs Li had no regard for the son of the second wife or the other adopted son, and caring solely for her own offspring, utterly forgot the true line — helping Chi-wên to make forcible entrance, and when the head of the family, Yeh Tê-tsang, in the general interest turned out the interloper, bringing accusations of violence and robbery.

Thus Mrs Wang and Mrs Hsü have been forced into advancing their claims.

Going on to the documentary evidence and the fictitious deed produced by Chi-wên, setting forth that his father-in-law left the four *mu* to him by will, it seems unnecessary to decide on the genuine character of the document; for supposing it to be so, although when there seemed no great hope of a male line Pi-chien

was perhaps justified in leaving his property to his half-son or daughter, yet as there are now both a legitimate and an adopted son to be provided for, and the property is scarce sufficient to find them food, Chi-wên has no business to claim it.

We set the will aside therefore, and direct the heads of the family to draw up an inventory of the property, and apply to the Magistrate for a deed settling it for the establishment of the two sons; and if there be any litigation, we will see what the penal law will do.

per Chang Mei-an M.

Note. — In this case it is clearly laid down that male heirs — whether by blood or adoption — existing, females have no claim to inherit, and that even a written will in their favour will be set aside. Also that children by blood and adoption will be equally regarded.

CASE 4 — DECISION OF HU CHÉ-YEN, PREFECT
OF NANKING

Dowry of daughters, and effect of marriage thereon.

This is an action brought against Chia Yün-min, son-in-law of Chu Chung-fang.

It appears that Chung-fang, having no direct heirs, married a daughter by a concubine to Tien-min, giving him a marriage room for the purpose, but apparently merely for the term of his stay — there is no evidence that the provision was meant to be permanent, the couple being one degree removed in consanguinity.

On Chung-fang's death however, Tien-min, not on the property, moved in with his family and took possession, overlooking the fact that Chung-fang's star had still a twinkle left in it, and that it was jumping at a conclusion to at once determine that he would have no posterity.

It is alleged, however, that while alive Chung-fang gave his daughter the wing of his house as dowry. But if so, why did she and her partner wait until Chung-fang's death to take

up residence? And in the absence of all documentary evidence, the allegation must be rejected.

The representation of the plaintiff, Mrs Chung-fang *née* Hu, appears very reasonable. She prays that Tien-min's claim be not immediately utterly rejected; but that the case be adjourned for three months, and that his rights be dependent on whether she gives birth to a son or a daughter; that if it be a son, he take his father's property; if a daughter — in which case she has betrothed her to one Fang — that two daughters standing in the position of one son, the house be divided between the two parties. We decree accordingly.

per Hu Chè-yen P.

Note. — The recognition of the force of dower, but the requisition of possession or documentary evidence to prove it.

It appears from this case that a daughter's share in the paternal property is determined by her marriage, but that if her father dies subsequently without male heirs, the property is divided equally between her and the other daughters

— subject possibly to the rule of hotchpot. As a matter of fact however, and indeed it appears indirectly from this case, male heirs existing, unmarried daughters are nevertheless entitled to dower in the proportion of one-half the son's share ; but it seems that the custom in this matter varies in different provinces, although the son is invariably bound to provide for and obtain the marriage of his sisters.

CASE 5 — DECISION OF MAO TIEN-LAI, PREFECT
OF PING-YANG

A brother inherits if deceased is childless, but, although heir, he cannot prevent his brother alienating the property while living, etc.

In this case, Tsao Hsiao is uterine brother of Tsao Chi-hsien. Chi-hsien appears to be childless, and in easy circumstances ; Hsiao to have two children, and to be utterly devoid of property — covetous therefore of the valuables his brother may leave behind him. Chi-hsien selling a piece of land belonging to him to the Military Doctor

Lo Hung-pao, Hsiao holds that his brother's property is his, and outrageously prevented Hung-pao enclosing it — and Hung-pao brings an action against him. Before this is decided, Hsiao tries to influence me [to decree] that Chi-hsien dying childless his property goes to his brother. Chi-hsien however happens to be alive, and Hsiao has therefore no claim — and for attacking the purchaser when his attempt to get his brother's land from him has failed, he must be flogged.

per Mao Tien-lai P.

Note. — This case lays down that a brother inherits when the deceased is childless, but that, although heir, he cannot prevent his brother alienating his property while living. As he could have stopped the sale had his brother inherited the land coupled with the condition of maintaining the ancestral sacrifices, whether this condition had been specific or merely to be implied, the plaintiff seems to have thought himself justified in preventing the transfer — though there was no such condition — on the simple ground of the injury to his prospects thereby.

Section III — Trusts

CASE 6 — DECISION OF YEN HSIAO-HSÜ,
MAGISTRATE OF SHAN-YANG

*Religious Trusts — The object of a trust being
carried out, the trust will still be
maintained, etc.*

In this case, Lo Chi-su, a compound of wolf and tiger, already convicted at the Prefecture of poisoning the country with his venom, on pretence of redeeming his offence, makes a fraudulent representation claiming a piece of land forming part of the demesne of the Hsing-lung monastery, as established by an inscription on stone of long standing. The monastery itself has been burnt down, but the conditions attached to the original grant, as to services, are still fulfilled by the priest Tsung-chên in a mat shed, known as the Lei-chia-chung farm. Chi-su represents further that the aforesaid land had been sold to him by a person against whom he has a spite — one Pêng Chien-i.

Now, supposing the sale to have been regular, Chi-su has no right to vent his spite on Buddha; and his conduct in passing from injuring the common people merely, to attacking the priests, and not satisfied with snapping at men, trying to bite at Buddha, shews that the punishment inflicted by the Prefect was not enough to frighten him. We must try therefore if the cangue will have any effect.

per Yen Hsiao-hsü M.

Note. — Pêng Chien-i, it would appear, was the person entitled to alienate — supposing the trust to have lapsed; but it is laid down that so long as the objects of the original trust are carried out, it will be maintained even against the representatives of the original grantors. Had the services been given up, the decision would have been different.

Note the weight given to the record of the original trust engraved subsequently on a stone tablet.

CASE 7 — DECISION OF CHI ERH-CHIA, JUDICIAL
COMMISSIONER OF YEN-CHOU

*Religious Trusts — A bonâ fide purchaser of
trust property for valuable consideration
and without notice will not be
disturbed, etc.*

In this case Yang Shih-chin is the purchaser by regular sale, witnessed by formal deed, of eighteen *mu* of valuable land belonging to one Sung. It appears moreover that the land has passed through at least three hands — Sung having purchased it of one Fang, while before this it is alleged that it was owned by one Hsiang and granted by him to the Kao-lung monastery.

The black-frocked gentry however held their peace when Fang took possession of the property; and it is only now after twenty years have elapsed that a wandering bonze Chao Hsi, combining with a disreputable associate Hsiang Hsiao-chêng, makes an attempt to get violent possession of the property.

The case has been decided by the Magistrate,

but his decision not giving satisfaction the case is brought in appeal by Shih-chin.

Firstly — Having given valuable consideration for the property, Yang cannot be said to have wrongfully seized it.

Secondly — If it be alleged that Sung had no deeds to shew for his possession, the priests would have been in much the same position as to proof of title, seeing they gave no consideration for the property.

Thirdly — Chao Hsi does not appear to be the regular representative of the Brotherhood, and has no right to appear in the action.

We cannot reconcile the ignorance of the right to the land at the time it was alienated, and the knowledge now — the ignorance of those primarily interested and the knowledge of their descendants, the ignorance of Fang's wrongful title and the knowledge of Sung and Yang's wrongful titles. Moreover the conduct of the shaveling (not contented with the six *mu* he had got) in seizing the opportunity to obtain violent possession of twelve *mu* more, is abominable and deserving of punishment.

We decree therefore that the Magistrate's decision be reversed; and for the nonce holding Buddha's staff for him order the bald-headed reprobate to be severely flogged.

per Chi Erh-chia J. C.

Note. — A *bonâ fide* purchaser of trust property for valuable consideration and without notice will not be disturbed, provided those interested had ample opportunity to oppose the transfer if they saw fit to do so. But inferentially a defective title would not hold if the rightful proprietors represented the matter within reasonable time. Also a bequest to a monastery or temple will be interpreted as a bequest to the priests specially attached thereto and their successors on the spot — not to the Church generally.

The decision would possibly have been different if the temple had been endowed coupled with a condition to maintain ancestral worship, and had one of the family interested come forward to protest against the alienation.

CASE 8 — DECISION OF LIU TIEN-YU, MAGISTRATE
OF YAO-CHOU

*Private Trusts — A bonâ fide purchaser of
trust property for valuable consideration
will not be disturbed save on
clearest evidence, etc.*

Wei Chêng-pu, some years back, appears to have purchased a piece of waste land from Chên Huang-lo, without any claim being raised by Huang Chih-chia — who now at length comes forward as owner of the property, and builds a house on it.

In support of his claim, he produces an unregistered deed drawn up at the end of the Ming dynasty, the seal on which appears to be of the present dynasty. This can scarcely be accepted. However as Chih-chia is a poor scholar, we direct Wei Chêng-pu to give him two taels as a charity, and at the same time the deed must be destroyed — lest it be brought in question hereafter.

per Liu Tien-yu M.

Note. — The title of a *bonâ fide* purchaser for valuable consideration will not be disturbed save on the clearest evidence; and doubtful documents calculated to afford ground for litigation will be ordered to be destroyed, if the Court thinks them insufficient proof of the claim based on them. Inferentially it is however laid down, that on clear evidence of plaintiff's title, the purchaser would have had to give way.

Note also that a seal subsequently affixed, will not be considered sufficient authentication of a document; and the disinclination to admit deeds executed previous to the commencement of the present dynasty.

CASE 9 — DECISION OF FANG CHAO-TSUN,
MAGISTRATE OF LÊ-SHUI

*Private Trusts — Property devised with
condition of maintaining ancestral
worship cannot be alienated.*

In this case the Chên family had seventy *mu* of land dedicated to the maintenance of ancestral

worship, each in turn having the management of the sacrifices. This had continued from time immemorial, the provisions of the founders of the family being such that it was impossible for any unfilial son or careless grandson to divert the land to other uses, though the family continued for one hundred generations. Suddenly an old but reprobate graduate Chên Chi-yi, disregarding the pious intentions of his ancestors, greedily and avariciously tries to appropriate twenty *mu* to his own ends. This was foolish, for his grey hairs were many; he was like a burnt-out censer at night when day is about to appear; little earthly enjoyment was before him, and dead he would not have lost the property, for if he died without children, would he not in the next world have fared with the rest of his ancestors — sharing alike with them the common provision for their spirits? And although Chên A-kuang be a widow, yet she is a member of the Chên family, and is asserting the great principle that the ancestral worship of the family should not be neglected.

We decree therefore that the trusteeship go

on as before, each in turn taking it, and that the tenants pay no heed to the terms of the underhand lease.

The offender ought to be punished, but in consideration of his age and poverty, we excuse him his disrespect of his ancestors.

per Fang Chao-tsun M.

CASE 10 — DECISION OF LÊ YEH-YÜAN, PREFECT
OF CHÊN-HUA

*Private Trusts — It is criminal to alienate
property devised subject to condition of
ancestral worship, etc.*

In this case, it appears that the parties Chiang Ju-jên, Chiang Hsiang-lin, and Chiang Tê-chi are all descended from a common stock; that their common ancestor Chiang Shên left 10 *mu* of land to be divided between the two branches of the family; that Hsiang-lin represents the elder branch, and Ju-jên and Tê-chi the cadet branch; that the separated branches have gone on harmoniously for many years — but have

now at length fallen out on the point whether the land was devised for the ordinary support of the devisor's descendants, or the encouragement of such of them as might devote themselves to study. From want of clearness on this point a battle of rats and bird has arisen.

According to Ju-jên and Hsiang-lin, their ancestor devised the property to the two branches to manage, with the duty of maintaining the ancestral sacrifices, and further that it is laid down in the deed that the land shall be industriously and economically cultivated. According to Tê-chi, the devisor left it for the encouragement of virtue, the property in the estate falling to any of his descendants who might devote himself to study — it being laid down in the deed that it should be given to the students, lest while following their studies they should be in want. Tê-chi took his degree last year, and therefore claims the property. But, in the meantime, it appears to have been sold by Hsiang-lin and Ju-jên to the Professor Chang-sui, and transferred to him.

Neither party have any proof, for the original deed merely says "to be zealously cultivated"

and does not say anything about diligently studying — the devisor, I am inclined to think, knowing how much more necessary property would be to common cultivators, than to those possessing the resources of their pen. Tè-chi's claim, therefore, is contrary to the intention of the original devisor. Nor are Ju-jên and Hsiang-lin without blame; the property was left to provide for the maintenance of ancestral worship, and they had no right to sell it and leave no provision for the spring and autumn sacrifices. I decree that they be flogged for the satisfaction of the injured *manes* of their ancestors.

per Lê Yeh-yüan P.

Note. — It is here laid down that it is criminal to alienate property devised coupled with the condition of the maintenance of ancestral worship — the property in that case being considered in some sort entailed; but it does not appear that the *bonâ fide* purchaser for valuable consideration is disturbed; therefore notice is also taken of two further uses, to either of which the proceeds over and above those

devoted to the original trust should be applied — the maintenance of the family generally, or the special support of those who devoting themselves to literature reflect honour on its deceased head.

Further it is laid down that where there is nothing to shew the intention of the devisor, he will be presumed to have taken a common-sense view of things, and wished the proceeds of the estate to be devoted to the use of those having the most need — and that this generally will be the ignorant labourer, and not the intelligent student.

CASE 11 — DECISION OF LIU HUANG-CHUNG,
PREFECT OF FOOCHOW

Adoptedsons — The foundation of a temple giving a right of patronage to the founder and his heirs gives a right indefeasible by subsequent benefactors, etc.

The dispute between Yang-hung and Chang-mou appears to be as to who should really be considered Patron of the Fu-tang-tzū, the other matters having flowed in. The temple appears

from the records to have been built by one of the Yang family — the character Yang having been introduced into its name to bring them good luck. It appears also that it was subsequently repaired by one Chang, who, having endowed it with lands, claims in consideration thereof to be considered Patron, and has furthermore altered the character Yang in the name and drawn up new records.

Now it is evident that there cannot be two lords in one temple without continual broils, and that one good deed would be the foundation of endless misfortune [if this were sanctioned]. I decree therefore that the temple belong to the Yang family; that Chang take his endowment back again, and sell it or give it to somebody else; and as I doubt — seeing that he got a rent from the priests of Tls. 3.20 annually — that Chang's gift was altogether a free and generous one, I order him to be flogged.

per Liu Huang-chung P.

Note. — The foundation of a temple giving the right of patronage to the founder and his

heirs gives a right indefeasible by subsequent benefactors; although these will be allowed to recall their benefactions if the consequent privileges of patronage are denied them.

The summary way in which the unsuccessful party to the suit is sentenced to corporal correction on apparently general principles may seem rather arbitrary; but in point of fact, the flogging being redeemable by a small fine, it amounts to very much the same as a decree of costs against him.

Section IV — Guardianship of infants

CASE 12 — DECISION OF CHANG MEI-AN, MAGISTRATE
OF CHUN-AN IN CHEKIANG

*Guardianship of children and property devolves
on next of kin, or failing them, on such
person of blood-relationship as the family
appoint to act, and such appointment
cannot without cause shown be
attacked by collaterals, etc.*

In this case, a son of (the plaintiff) Chu Chun-shih had married a daughter of one Yang Ju-tzŭ.

Ju-tzu and his wife subsequently falling victims to an epidemic, left two children, scarcely able to walk and still requiring a sheltering wing, to the care of their uncle Ju-pin. Afterwards Ju-pin died, and his widow M^{rs} Yu, feeling unequal to the guardianship, fell back on the kindred of the children — Chu Chê-ta (the mother's family), Yang Hung-lo (the father's family), etc. — who drew up a trust deed, making over the property on trust to Yang Hung-ping, an uncle of Ju-tzu, and appointing him guardian.

This appointment appears to have been very proper, as Hung-ping was a man of age and position and related by blood to the children; but it is violently attacked by Chun-shih, Yang Chun-yang, a member of the family, and Shê-chien, a connection by marriage.

We will not enter into their motives; but Shê-chien, being merely a connection by marriage can scarcely establish a claim to the guardianship; and we fear Chun-yang's heat in the matter would not be to the advantage of the children; nor, when we look into the matter, does Hung-ping appear to have neglected his trust —

everything is still there, nor is there any reason for Chun-shih and the others worrying about the matter.

We trust, therefore, that Hung-ping will go on with his difficult task of guardianship in the spirit in which he has commenced it — so that when his wards grow up it may be said that the age of devotedness did not pass away with Ying and Chui.

per Chang Mei-an M.

Note. — The principles herein acknowledged are: — that the guardianship of infants is primarily the duty of the next of kin, that the wife will continue in the position of the husband on his decease, that if she desires to be relieved of her trust the appointment of a guardian will be made by the blood-relations, and that this appointment cannot be attacked without cause shewn. Also that a connection by marriage has *primâ facie* no right to intervene, although in case of neglect of the wards or injury of their property he might as a remote relative be heard on their behalf.

CASE 13 — DECISION OF LI WÈN-CHIANG, DEPUTY
SALT COMMISSIONER OF THE LIANG-HUAI

*Relatives are the natural guardians of children
left orphans, but if shown to be unworthy
of the trust, a testamentary disposition
giving the guardianship to a
stranger will be upheld, etc.*

In this case Yung Jih-hsin, the deceased, the son-in-law of Wang Ming-wo, left a son Yung Yi-lang, and it is established that Ming-wo was a person of vile reputation.

On the approach of death, Jih-hsin appears to have been very anxious regarding the unprotected state in which he was leaving his son; for although willing to entrust his care to his mother-in-law, he was afraid to leave the property in charge of his father-in-law — apprehending, as has happened, that he would sell it. And he was wise; for as a son is the best judge of his father, so is a son-in-law of his father-in-law.

Jih-hsin therefore left his son to the care of his wife's family; but falsely representing that he

had sold it all, left his property secretly in trust to his friend Fang Yung-jên.

Ming-wo, however, heard of it, and at once reclaimed it from Fang; and in three years it was all made away with — as Jih-hsin had anticipated.

If we excuse Ming-wo's disregard of his son-in-law, as a person outside his family, he should still have had consideration for the son left by his dead daughter. And can this son, who having lost his mother when three months' and his father when four years' old, and who is entirely dependent on these few *mu* of land for food, raiment, and marriage, be satisfied — now that all is dissipated, and he has nothing left to cling to?

It appears that the portion of the estate which has been sold is utterly gone, but about half the property has been mortgaged and can be recovered. We decree therefore that Ming-wo's property be disposed of and applied to the redemption of the recoverable property; that it be given to Fang Yung-jên in trust for the orphan as his friend desired, and be handed

over to Yi-lang when he comes of age; and we order that Ming-wo be flogged for disregarding the dead and injuring the living.

per Li Wên-chang D. S. C.

Note. — Relatives are the natural guardians of children left orphans, *but if it is shown that they are unworthy of the trust*, a testamentary disposition giving the guardianship to a stranger will be upheld; otherwise it would appear the trustee so appointed cannot resist their assuming the guardianship and taking possession of the property.

Note also that the purchasers of the alienated property in this case are not disturbed, although it is admitted the land was improperly made away with.

MISCELLANEOUS APPENDICES

Appendix	I — Evolution of Law of Marriage
do.	II — Analogy between the Chinese and other systems
do.	III — List of works for study

APPENDIX I

EVOLUTION OF LAW OF MARRIAGE

The records are necessarily imperfect, but there is little difficulty in evolving both the manner and the reason of the law.

In the earliest times, utter savages, clothed in skins and dependent for food upon the fruits they could find in the forest, and the animals, scarce more bestial than themselves, they could entrap by craft or strength, each for himself wandered through the jungle. When two of opposite sex should chance to meet, the reproductive instinct, excited by the chance *rencontre*, would be satisfied without further formality — and they would probably go their way either immediately or shortly afterwards. Some of the unions would be more permanent however, and in their duration the lesson of the advantage of mutual aid would soon be learnt.

The next stage would be the association of these wandering individuals for the capture of some animal too strong for one alone to overcome. Bands would be formed which would wander through the woods together in search of game.

By degrees the benefit of living in communities would impress itself upon them. Some could go abroad and hunt, while the others prepared the skins for clothing, guarded the stores of roots and nuts, collected fuel, and prepared the suppers of the tired hunters when they returned to the lairs in which they lived.

Eventually the more intelligent would become distinguished from their fellows, directing the chase, and superintending the division of the spoils; and from the mutual jealousies of these chiefs it would come that one of their number would be considered head of all.

Such would appear to have been the case in the period in question, whether Fu Hsi signifies one individual or is merely a general name for the leaders at that period — an immaterial point. The attention of the ruler or succession of rulers at that period appears to have been directed to the necessity of making some arrangements to remedy the evils the *causa teterrima belli* was ever causing. For now living together in groups with the women round them,

it would happen from time to time that the same damsel would at the same period attract the notice of several braves, with the result that there would be a fight for her possession: perchance there would be no fight, but the chief would most coolly appropriate all the desirable women within the group to himself. In either event the result would be turmoil and discontent.

Fu Hsi, as a way out of the difficulty, decreed that no marriage should take place within the various groups or families: they must look outside for their wives: the women born in the family were taboo to all belonging to it. But the times were not yet ripe for civil marriage; and each union was accordingly, in the vast majority of instances, a rape — but a rape permissible only upon those outside the group. The family might within itself live at peace.

It is fabled that the same ruler instituted the Hundred Surnames still existing (upon which the well-known child's primer is founded), dividing the tribes into a hundred families, and giving each the name their descendants still bear. This is extremely doubtful, for numbers in early Chinese history were rarely specific — 3, 5, 10, 100, 1000, 10000, mean all, everyone, and not the exact number — so all therefore that can safely be attributed to the Fu Hsi in question is that he caused the various clans

to adopt the names of their chiefs and made their own women taboo to them.

Fights would still go on, but not to the same extent; for the clans would no longer care to retain women that could be nothing to them, and would make them over to those who came to seek them, without a fight — provided the claimant purchased the right to make her addresses by a sufficient offering of game.

APPENDIX II

ANALOGY BETWEEN THE CHINESE AND OTHER SYSTEMS — ESPECIALLY AS REGARDS ROMAN LAW

To trace analogies between the Chinese and other civilised systems of law, is tempting, interesting, and perhaps not unprofitable. Compared even with modern European systems, many striking similarities may be remarked: but perhaps more genuine analogies may be traced if a comparison be made with systems of an early period. And this is very natural, for as compared with China the tendency in other civilised countries has been 'change'. By 'change' of course is not necessarily implied 'progress', but alteration of ideas and thought — possibly disruption. And changes in the law have naturally been synchronous with changes in the general conditions.

For the sake of illustration, China may be represented as having moved — it may be slowly,

but ever onward — in the same straight line. Other civilisations originally moving in nearly parallel line with China have some of them ever so progressed — but, for the most part, at various points have diverged at lesser or greater angles. And so the divergence between China and its system and other existing systems is at this period great indeed.

It is accordingly to an early representative system that reference for purposes of analogy may most fruitfully be made. Roman Law is a subject, a knowledge of which — more or less — is pretty general; it is therefore proposed to contrast this system and the Chinese in somewhat superficial detail.

It will surprise many to learn the number of similarities between the Law of Rome — more especially at its maturity — and that of China. Prior to the period of Roman legal maturity a few simple analogies may be traced with a similar epoch in Chinese Law. So may be noted the general resemblance of the publications prior to the present Chinese Code, and the *Edictum Perpetuum*: and of the earlier attempts at codification in China, and such publications as the *Codex Gregorianus*.

It is however as aforesaid in the period of legal maturity of both states that most striking analogies will be found. So at the start there is the resemblance

in the manner by which the present Chinese Code at its inception and Justinian's Codes were formed respectively (*v.* preface to original Chinese Code of present dynasty A. D. 1647) — in either case a solicitous Emperor being aided by distinguished scholars. And of other likenesses in this connection: between the discouragement of publications additional to the Chinese Code (save by authority), and such in Rome: between the *Li*, and enactments supplementary to the Justinian Code: between the respective manners of legislating by edicts, decrees, and rescripts.

And next of the stated law — the comparison being also chiefly with mature Roman Law. As regards the law touching relationship in China and the conditions prevailing between parent and child (the doctrine of *potestas* being highly developed in China — *cf.* filial piety), husband and wife, master and slaves and freedmen, master and pupil — and again on such general points as adoption, and copartnership of relations in the family estate. Again as regards the Law of Property, many of the Chinese principles hereon resemble the Roman, even to such comparatively minor points as accession and alluvion — but the nature of the various estates in general differs. Further touching contracts generally: there are mutual resemblances in the principles, such as

agreement, fraud, duress, and the mode of regarding the doctrine of consideration: and there are additional resemblances between the respective varieties of contracts — contracts *re, verbis, literis*, and *consensu*, all exist in Chinese law. Agency is however fully recognised in China, whereas it was not so in Rome. Again, as regards delicts, there is the same distinction in both systems between wrongs to the person and wrongs to property — between *injuria* and *damnum injuria*. And there is also in this connection an analogy in the manner in which, according to both systems, a slave was assimilated to property. Again, of specific offences, there is the same comprehensiveness of the offence of larceny — touching *e.g.* embezzlement: between *tao* 盜 or larceny in China, and *furtum* in Rome: there is even the close analogy between the general division of the offence in both systems — between *ch'ieh tao* 竊盜 (*tao* by stealth, theft) and *ch'iang tao* 搶盜 (open *tao*, robbery) in China, and *furtum manifestum* or *nec manifestum* in Rome.

As regards procedure and administration there are also points akin: of administration, perhaps between the *ch'êng shên chih kuan* 承審之官 or sitting magistrate in China, and the *judex* — and the remedies for injustice lying against both functionaries: of procedure, certainly in such points as appeal — in both states the appeal resting ultimately with the

Emperor, but commonly with a select Board (the Judiciary Board in China, the *consistorium* in Rome).

Finally there is the general position and condition of the professional class in China at the present day — not very dissimilar to its position in Rome prior to Diocletian.

Such are a few of the analogies between two at first sight very different systems. But the comparison is not intended to be pressed too closely, or possibly two or three very incorrect conclusions will be evolved by the ingenious — for instance, that the Chinese system is behind the times: or possibly even that China has been much indebted to Rome or *vice versâ*. No, the curious points are not these, but this — that two races shut off from each other should have thought and moved much alike. The Chinese system is not behind the times of China — but is admirably suited to them; nor is the system an ancient curiosity or relic — but the evolved production of 4000 years.

APPENDIX III

LIST OF CHINESE WORKS RECOMMENDED
TO THE ATTENTION OF THE STUDENT

[illegible]

TITLE ETC.	REMARKS
<i>CODE, ETC. (CONTD.)</i>	
<p><i>Ta Ch'ing Hui Tien Tsê Li</i> 大清會典則例</p> <p>"The Official Practice of the "Ch'ing (present) dynasty".</p>	<p><i>Primâ facie</i> a work of import. Many editions are procurable.</p>
<p><i>Lü Li Pien Lan</i> 律例便覽</p> <p>"A convenient exposition of "the Fundamental Laws and "Supplementary Statutes".</p> <p>By Ts'ai Fêng-nien 蔡逢年</p>	<p>A useful work, not easily procurable. There is a good edition <i>circa</i> 1859.</p>
<p>Reference to special Provincial Statutes is also most desirable <i>e. g.</i>: —</p> <p><i>Ao Tung Shêng Li Hsin Tsuan</i> 粵東省例新纂</p> <p>"The Statutes (specially) applicable "to the province of Kwangtung".</p> <p>By Huang En-t'ung 黃恩彤</p>	<p>An old work — <i>circa</i> 1846 — but other publications of the kind are procurable.</p>

TITLE ETC.	REMARKS
<i>RULING AND EXPLANATORY CASES: —</i>	
<i>Hsing An Hui Lan</i> 刑案匯覽 “Collection of Ruling Cases “decided by the Judiciary Board”. (Published by Authority). By Pao Shu-yün 鮑書芸	An essentially important and standard work, of which various editions are procurable.
<i>Hsing Pu Pi Chao</i> 刑部比照 “Rulings of the Judiciary Board”. By Hsü Lien 許槩	An old work — circa 1834 — but is important and instructive. Fairly easily procurable.
<p>Reference to special Provincial decisions is also most important <i>e. g.</i>: —</p>	
<i>Ao Tung Ch'êng An Ch'u Pien</i> 粵東成案初編 “A compilation of Kwangtung “Leading Cases”. By Chu Yün 朱櫻	An old work — circa 1828 — but other publications of the kind are procurable.

TITLE ETC.	REMARKS
<i>CIRCULARS, ETC.</i> : —	
<i>Shuo T'ieh Lei Pien</i> 說帖類編 “Circulars Classified”.	
By Tai Tun-yüan 戴敦元	A <i>vade-mecum</i> for magistrates. An instructive work: old — <i>circa</i> 1835 — but not out-of-date. Fairly easily procurable.
<i>Tzū Chih Hsin Shu</i> 資治新書 “A Key to Correct Administration”.	
	This work might also be entitled ‘Straight Tips to ‘Officials’. It is important and valuable for reference. There are many editions, and it is easily procurable.
<i>Ch'ü Fên Tsê Li T'u Yao</i> 處分 則例圖要	
“A synopsis of the Legal “Punishments”.	
By Ts'ai Fêng-nien 蔡逢年	A standard work — <i>circa</i> 1860 — in tabular form.

In addition to a perusal of works such as the above, the *Ching Pao* 京報 or “Peking Gazette” should be constantly studied.

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-

ERRATA AND ADDENDA

- p. 23 line 4 for 八 read 入
" 91 " 9 " Ch'ung read Yün.
" 128 " 27 " 'of a junior' read 'by a junior'.
" 138 " 24 " 'hurt' read 'killed'.
" 322 " 19 " Hê read Ha.
" 324 " 14 " 'case' read 'cases'.
" 548 " 18 add "Mining law varies much with
"the locality, and in the districts
"proposed to be developed is in
"a stage of transition."
" 555 " 12 after 'advantages' insert "The treat-
"ment of smuggling varies much
"with the locality, and numberless
"local regulations are drawn up
"for its repression."

Introduction § 28, page LXVI line 5 "*the* parricide".
Take out the word "*the*".

In addition to which there are various obvious
spelling and typographical errors.

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